89-1988

Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

JOHN MONROE, ET AL

PETITIONERS

V.

CITY OF WOODVILLE
MISSISSIPPI, ET AL

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Are minority voters politically cohesive when at least 70% of minority voters consistently vote as a bloc for the minority preferred candidate in contested political elections?

2. Is the test for determining legally significant white bloc voting as announced in *Thornburg v. Gingles*, 478 U. S. 30 (1986), the same in jurisdictions where white voters constitute a minority of the voting age population as in jurisdictions where white voters constitute a majority of the voting age population?

3. Does a factual finding that significant numbers of minority voters cross-over and vote for the candidate not preferred by the overwhelming majority of the minority voters preclude a finding of racial vote dilution?

LIST OF PARTIES

The parties to the proceeding below were the appellants JOHN MONROE, JIMMY HARRIS, DORA MONROE, LARRY JOHNSON and all others similarly situated and the appellees CITY OF WOODVILLE, MISSISSIPPI, RON SENKO, IN HIS CAPACITY OF MAYOR, AND CHARLES JAMES, GARY D'QUILLA, TIM SESSIONS, AS MEMBERS OF WOODVILLE, MISSISSIPPI BOARD OF ALDERMAN, JOE TOWNSEND, MARY MAGEE, AND HERBERT CURRY, AS MEMBERS OF THE CITY ELECTION COMMISSION AND FRANCES TOWNSEND AS CITY CLERK.

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REFERENCE TO OFFICIAL OPINIONS BY LOWER COURTS

Petitioners seek review of adverse decisions rendered by the United States Court of Appeals for the Fifth Circuit. Those decisions are reported as *Monroe v. City of Woodville, Miss.*, 897 F. 2d 763 (5th Cir. 1990) (referred to as "Monroe V") and *Monroe v. City of Woodville, Miss.*, 881 F. 2d 1327 (5th Cir. 1989) (referred to as "Monroe IV"). The Fifth Circuit decisions affirmed the decision of the United States District Court for the Southern District of Mississippi, cited in *Monroe v. City of Woodville, Miss.*, 688 F. Supp. 255 (S.D. Miss. 1988) (referred to as "Monroe III"). The district court's decision was rendered after a trial, and after the case was remanded from the Court of Appeals for the Fifth Circuit. The Fifth Circuit decision remanding the case is reported in *Monroe v. City of Woodville, Miss.*, 819 F. 2d 507 (5th Cir. 1987) (referred to as "Wodville II"). The Woodville II decision reversed an earlier decision by the district court disposing of the case on summary judgment. The district court's summary judgment decision is reported in *Monroe v. City of Woodville, Miss.*, 636 F. Supp. 423 (S. D. Miss. 1986) (referred to as "Monroe I""). All five *Monroe* decisions are reported. Monroe V and Monroe IV are set out in Appendix A and Monroe III is set out Appendix B. Monore I and Monroe II are reported decisions and are referred to herein.

STATEMENT OF THE GROUNDS FOR INVOKING JURISDICTION

Petitioners seek review on writ of certiorari of two decisions rendered by the United States Court of Appeals for the Fifth Circuit in *Monroe IV* and *Monroe V* construing issues raised by petitioners under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973. The Fifth Circuit rendered judgment and entered on August 30, 1989. Thereafter, petitioners filed a timely Petition for Rehearing before the Fifth Circuit. The Fifth Circuit granted, in part, and denied, in part, petitioners' Petition for Rehearing on March 22, 1990.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254 and 2101(c). The questions involved are of substantial importance. See *Thornburg v. Gingles,* 478 U.S. 30 (1986), compare *Frisby v. Schultz,* 487 U. S. _____ (1988).

STATUTES INVOLVED

This case involves 42 U.S.C. Section 1973. A copy of the text of this statute is attached as Appendix "C".

STATEMENT OF THE CASE

Woodville, Mississippi is one mile square in size located in the extreme southwest corner of the State of Mississippi. The town has 1,512 residents. Afro-American residents comprise 64.3% of the town's population and 60.5% of the the town's voting age population. Woodville lies in one of the most rural, impoverished, and economically depressed areas of the State of Mississippi.[1] There is almost total social and educational segregation in Woodville. The town has a history of racial discrimination. Gross socio-economic disparities still exist between whites and Afro-Americans. Before 1965, de jure segregation prohibited Afro-Americans from participating in the electoral process in Woodville.

The town is governed by a mayor and four (4) aldermen elected at-large. There are no designated posts. A majority vote is required for election to the board of aldermen.

Although there have been Afro-American candidates for aldermen since 1969, only one black person, Charles James, has been elected as alderman in

[1] The facts contained in petitioners' statement of the case are taken from the district court's findings of fact and conclusions of law published in *Monroe v. City of Woodville, Miss.*, 688 F. Supp. 255 (S.D.Miss. 1988). Although petitioners appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit, neither petitioners nor respondents challenged the district court's fact finding, except for the ultimate facts critical to this case. The only ultimate facts challenged on appeal were those challenged by petitioners. Petitioners challenged the district court's ultimate findings that Afro-Americans in Woodville were not politically cohesive and white racial bloc voting in Woodville was not legally significant. Petitioners did not challenge any other facts found by the district court And, respondents did not challenge any of the district court's findings of fact.

In their initial opinion published in *Monroe v. City of Woodville, Miss.*, 881 F. 2d 1327 (5th Cir. 1989) and in their opinion on rehearing published in *Monroe v. City of Woodville, Miss.*, 897, F. 2d 763 (5th 1990), the Fifth Circuit misapprehened certain facts found by the district court. Since there was no challenge, on appeal, to the district court's underlying facts, those facts will be relied on.

Woodville.[2] He was first elected in 1981 and reelected in 1985.

Petitioners filed the instant Section 2[3] lawsuit in 1985 challenging Woodville's aldermanic election system as racially dilutionary.[4] The district court dismissed the action, on respondents' summary judgment motion, stating that Woodville's Afro-American population constituted a "safe district."[5] Petitioners appealed this adverse decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed the district court's summary judgment decision and sent the case back to the lower court for a trial.[6]

A trial was held on petitioners' Section 2 claim in 1988. The district court found that "[T]here was no real contest presented by the defendants to the plaintiffs' proposition that whites in Woodville bloc vote to a

[2] The Fifth Circuit intimated that three of Woodville's four aldermen are now black. *Monroe v. City of Woodville, Miss.*, 881 F. 2d at 1329, n. 2. The Fifth Circuit stated:

> Charles James was elected as an aldermen in 1981 and reelected in 1985. We note in passing that two additional black candidates were elected as aldermen in 1989.

Monroe v. City of Woodville, Miss., id.

The Fifth Circuit was wrong in its understanding of events subsequent to the district court's decision. Three blacks do not and have never served on Woodville's board of aldermen. In December, 1988, a black woman was appointed to the board of aldermen to fill a vacancy. During regular elections in May and June, 1989, she was elected becoming Woodville's second black alderman. Of the four aldermen elected, she received the least votes. This evidence was not before the district court because these events occurred subsequent to the decision in this matter. She was appointed by a majority white board of aldermen, apparently, in an attempt to moot the instant lawsuit.

[3] 42 U.S.C. 1973. The district court's federal question and civil rights jurisdiction was invoked pursuant to 28 U.S.C. Section 1331 and 1343 and 42 U.S.C. Section 1973(j)(f).

[4] These facts are taken from the Fifth Circuit opinion in *Monroe v. City of Woodville, Miss.*, 881 F. 2d at 1328.

[5] *Monroe v. City of Woodville, Miss.* 636 F. Supp. 423 (S.D. Miss. 1986).

[6] *Monroe v. City of Woodville, Miss.*, 819 F 2d 507 (5th Cir. 1987).

significant degree[7] for white candidates when white candidates are opposed by black candidates."[8] The court further found "that in Woodville white voters vote for white candidates and that black voters vote for black candidates",[9] . . . "but that black voters crossover to vote for white candidates in significant numbers[10] so that they are not politically cohesive."[11] The district court concluded "that there is obvious polarization of voting along racial lines."[12]

Finally, the trial court concluded that "the evidence presented in this case demonstrates that blacks can constitute a geographically compact and insular group."[13]

The district court, nevertheless, ruled adverse to petitioners, essentially holding that petitioners failed to prove that Afro-American voters in Woodville are politically cohesive and white bloc voting in town

[7] Evidence in the record reflects that white voters generally bloc vote at a rate of 100% for white candidates in racially contested elections. [See Appendix D-3, Dr. Ronald Love's testimony]. The district court apparently accepted this evidence because the court found that petitioners "may have established 'a white bloc vote', *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 263.

[8] *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 259.

[9] Evidence in the record shows that black voters generally bloc vote at the rate of 70-80% for black candidates in racially contested election. Appendix D-2, testimony of Dr. Ronald Love.

[10] Evidence in the record revealed that generally 20-30% of black voters crossover and vote for white candidates whereas 0% of white voters crossover and vote for black candidates.

Petitioners submit that the black crossover voting for white candidates is not significant. The district court in its conclusions of law used less dramatic terms. The court, there, stated that "there is much crossover voting by blacks for white candidates." *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 261.

[11] *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 259.

[12] *Id.* at 261.

[13] *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 262, referring to Exhibits P-1 and P15.

elections is legally significant.[14]

Petitioners appealed the district court's trial decision to the Fifth Circuit. Another panel of the Court of Appeals affirmed the district court's judgment in favor of the Woodville respondents.

The Fifth Circuit essentially agreed with the district court that Woodville's Afro-American voters were not politically cohesive and that "both white and black residents in Woodville engage in *some amount* of racial bloc voting.[15] (Emphasis added).

As to the factual issue of political cohesion, the Fifth Circuit acknowledged that 1983 election results proved "a strong degree of racial bloc voting by black residents, which could indicate political cohesion."[16] However, the court indicated that 1987 election results "weigh against finding political cohesiveness."[17] The court noted that petitioners' expert on racial bloc voting and respondents' expert on racial bloc voting disagreed as to whether or

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[14]The United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) held that in a usual vote dilution case, a protected minority had to prove three essential facts in order to prove a prima facie case of minority vote dilution. The district court held that petitioners did prove one element of the *Thornburg* tripartite test, i.e., that Afro-Americans "can constitute a geographically compact and insular group." *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 262.

[15] *Monroe v. City of Woodvile, Miss.*, 897 F. 2d at 764. The Fifth Circuit added the adjectives "some amount" to its discourse on legally significant white bloc voting in its amended opinion. The court, in its earlier opinion rendered in *Monroe v. City of Woodville, Miss.*, 881 F. 2d 1327, 1332, ruled "[T]he district court found that both white and black residents in Woodville engage in racial bloc voting." The adjectives "some amount" describing racial bloc voting distorts the district court's finding on that subject. The district court found a "significant degree" of white bloc voting in Woodville. *Monroe V. City of Woodville, Miss.*, 688 F. Sup. at 259. The district court also found "that black voters vote for black candidates" although significant numbers of blacks crossover and vote for white candidates. *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 259.

[16]*Monroe v. City of Woodville, Miss.*, 897 F. 2d at 764.

[17]*Id.*

not Woodville's blacks were politically cohesive.[18] Petitioners' expert testified that if 51-60% of Woodville's black voters voted as a bloc for a particular candidate in contested elections, they would be politically cohesive.[19] He testified that at least 70-80% of black voters in Woodville voted as a bloc for the the black candidate in contested elections.[20] Respondents' expert, Dr. Craig Van Gelder, testified that 84-85% of blacks in Woodville would have to vote as a bloc for a particular candidate in order for blacks to be politically cohesive.[21]

As to the factual issue of whether or not white bloc voting in Woodville is legally significant, uncontradicted testimony revealed that white voters in Woodville vote "almost 100 percent" as a bloc for white candidates in racially contested elections.[22] During the time of trial, only one black candidate had been successful in being elected as an alderman,[23] although 16 blacks had run for the position since 1969.[24] Blacks, in Woodville's elections, generally vote at the 70 percent level or higher for black candidates in racially contested elections.[25]

ARGUMENT I

Minority Voters Are Politically Cohesive When At Least 70 Percent Of Minority Voters Consistently Vote As A Bloc For The Minority Preferred Candidate In Contested Political Elections.

The Fifth Circuit, in affirming the district court, held that black voters in Woodville are not politically cohesive essentially because 1987 election results revealed that approximately 20-30% of the town's black

[18] Id.

[19] Appendix D-3, testimony of Dr. Ronald Love.

[20] Appendix D-2, testimony of Dr. Ronald Love.

[21] Appendix E-2,3, testimony of Dr. Craig Van Gelder.

[22] Appendix D-3, testimony of Dr. Ronald Love.

[23] *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 257.

[24] *Monroe v. City of Woodville, Miss.*, 819 F. 2d at 508.

[25] Appendix D-2, testimony of Dr. Ronald Love.

voters crossed over[26] and voted for the non-minority preferred candidate in contested elections.[27] The court relied on the testimony of respondents' expert, Dr. Van Gelder, in reaching this conclusion.[28] Dr. Van Gelder testified that Woodville's blacks would have to vote as a bloc at the 84-85 percent levels in order to be politically cohesive.[29] Petitioners' expert, Dr. Ronald Love, testified that blacks in Woodville consistently bloc voted at the rate of 70-80% for black candidates in racially contested elections, and therefore were politically cohesive.[30] Dr. Love was the only expert to perform a racial bloc voting analysis.[31] Dr. Van Gelder did not perform his own racial bloc voting analysis. Thus, from the Fifth Circuit's holding, affirming the district court, and the evidence, it is apparent the Fifth Circuit held that in order for a racial or language minority to be politically cohesive in a jurisdiction wherein the minority voting age population

[26]The Fifth Circuit reviewed the district court's decision on political cohesion under Fed. R. Civ. P. 52(a)'s clearly erroneous standard. *Monroe v. City of Woodville, Miss.*, 897 F. 2d at 764. The Fifth Circuit indicated that there were two views of the evidence on the issue. One view, the court recognized, is that Woodville's blacks are politically cohesive. The other view, the court indicated, was that Woodville's blacks are not politically cohesive because in a single election year, 1987, 20-30% of black voters crossed over and voted for white candidates for elective offices in racially contested elections.

However, there are not two views of the evidence. At least 70% of Woodville's black voters have consistently voted for minority preferred candidate in racially contested elections.

[27]*Monroe v. City of Woodville, Miss.*, 897 f 2d at 764. See footnote 20 and 21, supra.

[28]*Monroe v. City of Woodville, Miss.*, 897 F. 2d at 764.

[29]See footnote 21, supra.

[30]See footnote 20, supra. The court of appeals agreed that the 1983 elections showed a strong degree of racial bloc voting by Woodville s blacks. Dr. Love testified racial bloc voting was greater in 1983 than in 1987. Since the Fifth Circuit indicated that there was no issue of fact that the 1983 elections indicate Woodville's blacks are politically cohesive, petitioners' petition for a writ of certiorari will address the Fifth Circuit's holding on the 1987 election results.

[31]Appendix E-2, testimony of Dr. Craig Van Gelder.

constitutes a numerical majority of the total voting age population, the minority voters would have to consistently bloc vote at the 84 percent level or higher in order to be politically cohesive. It is equally apparent the Fifth Circuit held that in such a jurisdiction when at least 70 percent of the minority voters consistently vote as a bloc for the minority preferred candidate in contested political elections, the minority voters are not politically cohesive. An important federal question is raised by the Fifth Circuit's decision, in light of *Thornburg v. Gingles, supra,* i.e. what percentage of minority voters must vote as a bloc in order to constitute "a significant number." The Fifth Circuit has decided this important question of federal law which has not been, but should be, settled by the Supreme Court. This question is inimical to one prong of the test utilized in minority vote dilution cases, i.e. is the minority politically cohesive.

Political cohesion, in the context of minority vote dilution, was first defined by this court in *Thornburg v. Gingles, supra.* There, the court held that "showing that a significant number of minority group members usually vote for the same candidates is one way of proving political cohesiveness necessary to a vote dilution claim" *Thornburg v. Gingles, supra* at 56. Lower federal courts, from other circuits, have consistently held that proof of minority racial bloc voting equates with proof of minority political cohesion, as announced in *Thornburg v. Gingles, supra.*[32] The Eleventh Circuit noted in *Solomon v. Liberty County, Fla.,* 899 F.2d 1012 (11th Cir. 1990) that "[I]n *Gingles,* black support for black candidates ranged from 71% to 92% in all but 5 of 16 primarily elections, and from 87% to 96% in the general election." *Solomon v. Liberty County, Fla., supra* at 1020,

[32]*Gomez v. City of Watsonville,* 863 F. 2d 1407, 1415 (9th Cir. 1988) ("the issue of political cohesiveness is to be judged primarily on the basis of the voting preferences expressed in actual elections")' *Solomon v. Liberty County, Fla.,* supra. at 1019-1020 (11th Cir. 1990) (strong minority bloc voting equates with political cohesiveness); *Collins v. City of Norfolk, Va.,* 883 F. 2d 1232, 1237, n. 6 (4th Cir. 1989) (court of appeals noted district court found racially polarized voting to equate with political cohesion).

n. 10. Although this court has not ruled what threshold percentage of a racial or language minority must vote, as a bloc, for the minority preferred candidate in order to be considered "politically cohesive," the court should settle this issue. A new federal census will be completed shortly. Thousands of political jurisdictions will reapportion and redistrict election boundaries. Undoubtedly, litigation under the Voting Rights Act of 1965, as amended,[33] will probably heighten. The Fifth Circuit's holding in this case could create chaos in the fifth as well as other circuits.[34]

Thus, the federal question of what threshold percentage of minority voters must vote as a bloc for the minority preferred candidate in order to be considered politically cohesive should be settled by this court.

ARGUMENT II

Is The Test For Determining Legally Significant White Bloc Voting As Announced in *Thornburg v. Gingles*, 478 U. S. 30 (1986), The Same In Jurisdictions Where White Voters Constitute A Numbercial Majority Of The Voters As In Jurisdictions Where White Voters Constitute A Numerical Minority Of The Voters?

This court has never made any distinction in the applicability of the Voting Rights Act and the controlling

[33]42 U.S.C. Section 1971, et. seq.

[34]After *Thornburg v. Gingles, supra,* many courts now hold that racial and language minorities must prove the three-prong test announced in *Thornburg* in order to prevail on a Section 2 (vote dilution) claim. Many minorities could find themselves in petitioners' shoes should other courts hold that although they have proven minority racial bloc voting, such racial bloc voting does not establish minority political cohesion. This is true, where, as here, the Fifth Circuit did not find error in the district court's reliance on respondents' expert testimony that in order to be politically cohesive, the minority voters would have to vote, as a bloc, at the 84-85 percent level.

legal precedent to cases wherein the protected minority was in the numerical majority or the numerical minority. *White v. Regester,* 412 U.S. 755.[37]

The Fifth Circuit has made a significant departure from the precedent of *White v. Regester,* by implicitly holding that in the present case Afro-Americans by virtue of their numerical superiority should be able to elect candidates of their choice. This fact was the foundation of the court's holding.[38]

This court has held that:

> "The essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred

[37]The facts in *White v. Regester,* were that in Bexar County, Texas, Mexican-Americans were a plurality in terms of their numerical percentage of the population. At trial, defendants argued that because the Mexican-Americans were in the numerical majority they were not entitled to constitutional relief. The lower court rejected this argument stating:

> "*Whitcomb* speaks of a "minority", and we see no need to limit that to numerical minority. In fact, "minority" has traditionally been used in Civil Rights cases to denote a racial or social group of people, not a numerical percentage. Therefore, the Mexican-Americans of San Antonio are not red out of *Whitcomb* simply because their numbers may predominate over those of the Angolos. They still fall within the rationals of *Whitcomb.*" *Graves v. Barnes,* 343 F. Supp. at 733.

The facts are stated by the trial court in *Graves v. Barnes,* 343 F. Supp. 704, (W. D. Texas, 1972) (three-judge panel) aff'd. sub. nom. *White v. Regester, supra.*

[38]The appellate court stated:

> "If there is a black preferred candidate, or set of candidates, the roughly twenty percent numerical superiority in voting age population should provide black residents with a sufficient opportunity for success at the polls." *Monroe v. City of Woodville, Miss.,* 881 F. 2d 1333.
>
> and
>
> "The district court evidently found it difficult as do we, to analyze "legally significant white bloc voting" in a jurisdiction where blacks are in the numerical majority." *Id.* at 1332.

> representatives. This court has long recognized that multimember districts and at-large voting schemes my "'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" *Thornburg v. Gingles, supra* at p. 47.

A pertinent issue in this case is whether the white bloc vote in an at-large system causes blacks inequality of opportunity to elect candidates of their choice in the Town of Woodville, Mississippi. The answer to that question is affirmative and the evidence in support of that conclusion is abundant. For example, as of the trial of this action only one black had won a seat on the Board of Aldermen out of a total of sixteen (16) Afro-Americans candidates.[39]

The focal point of the third prong of a vote dilution claim i.e. legally significant white bloc voting, as articulated in *Thornburg*, is a white bloc vote which will normally defeat the combined strength of the minority support plus the white crossover.[40] The trial court's emphasis is not on the capacity of the white bloc vote to defeat minority candidates but rather on the black crossover.[40] This conclusion was tacitly affirmed by the appellate court.[41]

As a result of the emphasis on the black crossover as a means of negating a finding legally significant white bloc voting, the Fifth Circuit has enunciated a new test which this court should address to clarify the legal standards which lower federal courts should employ.

ARGUMENT III

[39]*Monroe v. City of Woodville, Miss.*, 819 F. 2d 507 at 508.

[40]The trial court stated:

> "White candidates win not because of the white bloc vote, but because of the black crossover vote. The plaintiffs may have established a "white bloc vote", but they have not proved legally significant racial bloc voting for purposes of a Section 2 claim." *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 263.

[41]*Monroe v. City of Woodville, Miss.*, 881 F. 2d at 1333.

A Factual Finding That Significant Numbers Of Minority Voters Crossover And Vote For The Candidate Not Preferred By The Overwhelming Majority Of The Minority Voters Does Not Preclude A Finding Of Racial Vote Dilution.

Essentially, the Fifth Circuit affirmed the district court's conclusion that crossover voting by 20-30% of minority voters[42] in racially contested elections preclude a finding of vote dilution.[43] Such a holding is incongruous with this court's decision in *Thornburg v. Gingles, supra,* that a prima facie case of a minoring vote dilution is established by proving: (1) the protected minority[44] is geographically insular such that a majority

[42]The district court held that "significant numbers" of Woodville's black voters "are crossing over to elect white candidates." *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 259. The Fifth Circuit indicted that his holding is limited to the results of 1987 elections only. *Monroe v. City of Woodville, Miss.*, 897 F. 2d at 764. Petitioners' expert analyzed election data for the 1983 and the 1987 elections. *Monroe v. City of Woodville, Miss.*, 897 F. 2d at 764. "The 1983 elections show a strong degree of racial bloc voting by black residents, which could indicate political cohesion." *Monroe v. City of Woodville, Miss.*, 897 F 2d at 769. Respondent's expert "did not make a full study" of the elections. *Monroe v. City of Woodville, Miss.*, 688 F. Supp. at 259. (Dr. Van Gelder testified that the did not analyze the election data to draw a conclusion of racial bloc voting or political cohesion). Petitioners' expert, Dr. Love, testified that the 1987 election results showed that 70-80% of blacks voted as a bloc for black candidates. [Appendix D-2, Thus, 20-30% of blacks crossed over and voted for white candidates in 1987. This is the evidence from which the district court concluded that "significant numbers" of blacks were crossing over.

[43]*Monroe v. City of Woodville, Miss.*, 897 F.2d at 764; *Monroe v. City of Woodville, Miss.*, 881 F. 2d at 1334.

[44]Protected minority is used to identify those classes of voters entitled to invoke the protection of the Voting Rights Act of 1965, as amended. See Rhodes, *Enforcing the Voting Rights Act in Mississippi Through Litigation*, 57 Miss. L. J. 705, 705-706, n. 5(Dec. 1987); *Graves v. Barnes*, 343 F. Supp. 704, 733 (W. D. Tex. 1972) (three-judge court) affirmed in part and reversed in part sub. nom. *White v. Regester*, 412 U. S. 755 (1973). Both the Fifth Circuit and district court in the instant case indicated the word "minority" might refer to a numerical minority rather than a racial or language minority. See *Monroe v. City of Woodville, Miss*, 881 F. 2d at 1334.

minority single member district could be drawn if the multi-member feature is dismantled; (2) the protected minority is politically cohesive; and (3) white bloc voting usually defeats the minority's preferred candidate. *Thornburg v. Gingles, supra* at 51. Under *Thornburg,* the focus of the inquiry into a minority's Section 2 vote dilution claim is: are a significant number of the minority group members voting together, and, if so, what impact does white bloc voting have on their ability to elect candidates of their choice? The Fifth Circuit has, in Monroe, turned the focus of the inquiry away from the significant number of minority group members and the impact of white bloc voting on their voting strength to the few crossover minority votes. Now, in the Fifth Circuit, the focus of the inquiry is: how does the crossover minority vote impact the ability of minority group members to elect candidate of their choice. Or, alternatively, the focus in the Fifth Circuit now is — if all the minority group members vote as a bloc could they elect candidates of their choice?

This shifting of the focus of the inquiry in this vote dilution case conflicts with the Supreme Court's pronouncement in *Thornburg v. Gingles, supra.*

CONLUSION

On the basis of the foregoing facts and authorities, petitioners respectfully submit that their petition for a writ of certiorari should be granted.

APPENDIX A

MONROE v. CITY OF WOODVILLE, MISS.
Cite as 897 F. 2d 763 (5th Cir. 1990)

John MONROE, et al.,
Plaintiffs-Appellants,

v.

CITY OF WOODVILLE, MISSISSIPPI et al., Defendant-Appellees.

NO. 88-4433

United States Court of Appeals,
Fifth Circuit

March 22, 1990.

Rehearing and Suggestion for Rehearing
En Banc Denied March 22, 1990

Black voters brought action challenging at-large aldermanic election system in city, alleging that system diluted voting strength of blacks. The United States District Court for the Southern District of Mississippi, 636 F. Supp. 423, dismissed action, and voters appealed. The Court of Appeals, 819 F.2d 507, reversed and remanded. On remand, the District Court, William Henry Barbour, Jr., Chief Judge, 688 F. Supp. 255, entered judgment for city, and appeal was taken. The Court of Appeals, 881 F.2d 1327 affirmed and, on motion for rehearing, held that fact that black voters voted as bloc for black candidates did not mandate finding of political cohesion.

Ordered Accordingly.

1. Elections — 12(1)

For purpose of vote dilution claim under Voting Rights Act, fact that minority group votes as bloc for minority candidates does not mandate finding of political

cohesion where there is also evidence of significant and consistent crossover voting; while statistical proof of political cohesion is likely to be most persuasive form of evidence, courts must carefully examine statistical evidence or racial bloc voting to determine its relevance and probativeness to finding of political cohesiveness. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

2. Municipal Corporations — 80

Evidence supported finding that there was not political cohesion among city's black voters for purpose of claim that city's at-large aldermanic election system diluted voting strength of blacks; although there was strong degree of racial bloc voting by black voters and although both expert and lay witnesses testified as to political cohesiveness among black voters, there was significant degree of crossover voting for white candidates by black voters in recent elections and there was also expert and lay testimony indicating lack of cohesiveness. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

Willie L. Rose, Southwest, MS Legal Service, McComb, Miss., Carroll Rhodes, Hazlehurst, Miss., Deborah A. McDonald, Natchez, Miss., for plaintiffs-appellants.

Robert B. McDuff and Frank B. Parker, Lawyers Com'n for Civil Rights Under Law, Washington, D. C., for amicus curiae.

Dennis L. Horn, Jackson, Miss., Richard T. Watson, Woodville, Miss., for defendants-appellees.

Appeal from the United States District court for the Southern District of Mississippi.

ON PETITION FOR REHEARING

(Opinion Aug. 30, 1989, 5th Cir. 881 F.2d 1327)

Before GEE, GARZA and JONES, Circuit Judges:

PER CURIAM:

Having considered appellants' motion for rehearing and decided that it is in part well-taken, the court herewith revises part A and the first sentence of part B of the opinion as follows:[1]

A. Political Cohesion

[1] [3] Based on the evidence before it, the district court concluded that the appellants did not prove political cohesion among the black voters in Woodville.

That the appellants had the burden of proof on this issue is not disputed. *See Overton,* 871 F.2d 529, 543 (Jones, J. concurring). Appellants assert that this finding embodies an error of law as well as fact. They note that the district court accepted the parties' stipulation that both whites and blacks in Woodville generally vote along racial lines. According to appellants, *Thornburg v. Gingles, Campos v. City of Baytown,* 840 F.2d 1240 (5th Cir. 1988), and *Citizens for a Better Gretna v. City of Gretna,* 834 F.2d 496 (5th Cir. 1987), hold that if the district court finds that a minority group votes as a bloc for minority candidates, political cohesion within the minority group is proven even if the district court finds significant and consistent cross over voting by the black electorate. We disagree.

Thornburg does recognize that establishing "that a significant number of minority group members usually vote for the same candidates is one way of proving political cohesiveness..." 106 S. Ct. 2769-70 (emphasis added). Statistical proof of political cohesion is likely to be the most persuasive form of evidence, although other evidence may also establish this phenomenon. *Brewer,* 876 F.2d 448, 453 (lay testimony from members of the community on political cohesion might be sufficient). Nevertheless, courts must careful examine statistical evidence of racial bloc voting to determine its relevance and probativeness to a finding of political cohesiveness. *Accord Overton v. City of Austin,* 871 F.2d 529.

1. The remainder of the opinion is unchanged.

Political cohesion is required under *Thornburg* for a fundamental reason. As the Court said, "if the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority interests." *Thornburg* 106 S.Ct. at 2767.

We turn, then to the district court's finding that Woodville's blacks are not politically cohesive. The ambit of appellate review of this fact is limited. A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum CO.,* 333 U. S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently....This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. *Anderson,* 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511.

[2] [4] In this case both parties can point to evidence in the record to support their positions. The 1983 elections show a strong degree of racial bloc voting by black residents, which could indicate political cohesion. On the other hand, the more recent results from the 1987 county elections indicate a significant degree of crossover voting for white candidates by black citizens.[10] Crossover voting by a minority group does not preclude a finding of political cohesiveness per se, but its presence is relevant. The 1987 data, therefore, weigh against finding political cohesiveness. Dr. Love opined that Woodville's black residents were politically cohesive; Dr. Van Gelder, appellees' expert, disagreed. Testimony from black residents of Woodville also differed

on this point.[11] Therefore, from the record before us, we cannot say that the district court clearly erred in its finding.

B. Legally Significant White Bloc Voting

The district court found that both white and black residents in Woodville engage in some amount of racial bloc voting.

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10. Mississippi's anti-single-shot provision did not apply to county elections.

11. Two black witnesses testified that, in their view, the black residents of Woodville are not politically cohesive. By contrast, a number of blacks have held public office in Wilkinson County in recent years.

In all other respects, the petition for rehearing is DENIED, and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

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MONROE v. CITY OF WOODVILLE, MISS.
Cite as 881 F.2d 1327 (5th Cir. 1989)

John MONROE , et al.,
Plaintiffs-Appellants,
v.
CITY OF WOODVILLE, MISSISSIPPI,
et al., Defendants-Appellees.
No. 88-4433

United States Court of Appeals,
Fifth Circuit
Aug. 30, 1989

Black voters brought action challenging at large aldermanic election system in city alleging that city diluted voting strength of blacks. The United States District Court for the Southern District of Mississippi, 636 F. Supp. 423, dismissed action, and voters appealed. The Court of Appeals, 819 F.2d 507, reversed and remanded. On remand, the District Court, William Henry Barbour, Jr., J., 688 F. Supp. 255, entered judgment for city, and appeal was taken. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) District Court's finding that black voters were not politically cohesive was not clearly erroneous, and (2) given individual findings that black residents constituted majority of city's voting age population, that blacks crossed over to vote for white candidates to large degree, that blacks served in many public offices in surrounding county, and that black community was very politically active, district court's finding that under totality of circumstances, city's multimember districting scheme did not run afoul of antidilution provision of Voting Rights Act was not clearly erroneous.

Affirmed.

1. Elections — 12(3)

Plaintiffs bringing vote dilution action under Voting Rights Act must establish that minority group is sufficiently large and geographically compact to constitute majority in single member district, that minority group is politically cohesive, and that white majority votes sufficiently as bloc to enable it — in absence of special circumstances, such as minority candidate running unopposed — usually to defeat minority's preferred candidate. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

2. Elections — 12(3)

Unless threshold showing of vote dilution in violation of Voting Rights Act has been established, court must determine under totality of circumstances whether Act has been violated. Voting Rights Act of 1965 § 2, as amended, 42 U.S.C.A. § 1973.

3. Elections — 12(3)

Proof that minority group votes as bloc for minority candidates does not establish "political cohesiveness" required for

threshold showing of vote dilution in violation of Voting Rights Act. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

4. Municipal Corporations — 80

District court's finding that city's blacks were not politically cohesive as required to make threshold showing of vote dilution in violation of Voting Rights Act was not clearly erroneous; results from county elections indicated significant degree of crossover voting for white candidates by black citizens, and inability of city's black residents, who comprised over 60% of city's voting age populations, to put significant numbers of allegedly black preferred candidates in local offices provided further evidence of lack of political cohesion. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

5. Municipal Corporations — 80

Given individual findings that black residents constituted majority of city's voting age populations, that blacks crossed over to vote for white candidates to a large degree, that blacks served in many public offices in surrounding county, and that black community was very politically active, district court's finding that under totality of circumstances, city's multimember districting scheme did not run afoul of antidilution provision of Voting Rights Act was not clearly erroneous. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

Willie L. Rose, Southwest Miss. Legal Services, McComb, Miss., Carroll Rhodes, Hazlehurst, Miss., Deborah A. McDonald, Natchez, Miss. for plaintiffs-appellants.

Robert B. McDuff, Frank B. Parker, Lawyers Committee for Civ. Rights Under Law, Washington, D.

C., for amicus curiae.

Dennis L. Horn, Jackson, Miss. Richard T. Watson, Woodville, Miss., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GEE, GARZA, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellants, black residents of Woodville, Mississippi, brought this action in 1985 against the City of Woodville alleging that the city's aldermanic election system diluted the voting strength of Woodville's black residents in violation of Section 2 et seq. of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 et seq. (1982). Appellants would have the court superintend the division of Woodville's single electoral district into four single-member districts. The district court originally granted summary judgment to appellees. *Monroe v. City of Woodville, Mississippi,* 636 F. Supp. 423 (S.D. Miss. 1986) We reversed and remanded for a trial on the merits. *Monroe v. City of Woodville, Mississippi,* 819 F. 2d 507 (5th Cir. 1987). After trial, the district court concluded that Woodville's at-large election system did not violate Section 2. Having considered appellants' broad attacks on this result, we nevertheless affirm the judgment on somewhat different reasoning than the district court employed.

I

Woodville, Mississippi, is exactly one mile square and claims 1,512 inhabitants. Black residents in Woodville account for 64.3% of the total population and 60.5% of the voting age population. According to the district court, Woodville is highly socially segregated and lies in one of the most rural, impoverished and economically depressed areas of Mississippi.

Woodville's mayor and four aldermen are elected in at-large contests. When this suit was filed, Mississippi

prohibited "bullet," or "single-shot," voting in municipal elections.[1] Further, until 1987, Woodville's

residents were required to register both with the city and county in order to vote in their respective elections. The town has never included more than one voting precinct.

Although blacks constitute 60.5% of Woodville's voting age population and at least two black candidates have run for aldermanic seats in each city election since 1965, when this case was filed in 1985, only one black candidate had been elected to that post.[2] During the same twenty year period, four black candidates have unsuccessfully run for mayor, and three blacks failed in bids for election as the town marshall, another at-large post. None of the seven black residents who have run for a position on Woodville's democratic executive committee since 1965 has been successful.

II

Congress, in amending Section 2, affirmed its commitment to an "effects" test of voting rights discrimination based on the "totality of the circumstances." *See* S.Rep. No. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code Cong. and Admin. News 177 at 192-93; *Thornburg v. Gingles,* 478 U.S. 30, 35, 106 S.

[1] Mississippi has recently enacted comprehensive changes to its election laws. The Mississippi legislature repealed its "anti-single-shot" statutory requirement for municipal elections effective January 1, 1987. Miss. Code Ann. § 21-11-15 (Supp. 1987). Single-shot or bullet voting, therefore, is now permitted under Woodville's electoral system. In addition, Mississippi's legislature abolished dual county-city registration as of January 1, 1987, but county-only registration prior to that date do not substitute for city registration. See Miss. Code Ann. § 21-11-3 (Supp. 1987) & §§ 23-5-303(3), 23-15-39 (Sup. 1988)

[2]. Charles James was elected as an alderman in 1981 and reelected in 1985. We note in passing that two additional black candidates were elected as aldermen in 1989. The district court did not have the results of this election before it; accordingly, these results play no part in our review of the court's conclusions.

Ct. 2752, 2758, 92 L.Ed.2d 25, 37 (1986); *Brewer v. Ham,* 876 F.2d 448, 450 (5th Cir. 1989). At the same time, however, Section 2 explicitly disallowed resort to a rule of proportional representation by race or ethnicity. Our judicial resources strain to walk the statutory tightrope in this case, because Woodville's black plaintiffs contend that they were denied effective political representation notwithstanding their decisive numerical voting majority. Confronted by a similar paradox, a previous panel of our court asked whether

> supposing that the proposed new system still fails to produce a black winner, we will then be asked to continue down the slippery slope, mandating new designs which segregate blacks into greater and greater concentrations until at last a black is elected? Somewhere along this downward course, the goal of an open and pluralistic political process, where groups bargain among themselves, is transformed into one of proportional representation by persons beholden for office to discete ethnic groups.

Houston v. Haley, 859 F.2d 341, 342-43 (5th Cir. 1988), *vacated,* 869 F.2d 807 (5th Cir. 1989).

Nevertheless, when this case appeared before us after summary judgment, we rejected the city's claim that even if a violation of the Voting Rights Act had occurred, Section 2 offers no possible remedy because of the blacks' significant majority at the poll. The case accordingly went to trial, and we review it now on a full record.

Congress instructed courts adjudicating Section 2 claims to conduct a "searching and practical evaluation" of "past and present reality" to determine whether participation in the political process is "equally open" to all persons. *See Thornburg,* 106 S.Ct. at 2763-64 (quoting from S. Rep. No. 417, *supra).* As guidance for this broad inquiry, Congress directed attention back to our Circuit's opinion in *Zimmer v. McKeithen,* 485 F. 2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S. Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam),

which identified a number of factors generally relevant to a fact-bound, intensely local appraisal of the challenged electoral system. Congress did not intend these factors to be exclusive. *Thornburg*, 106 S. Ct. at 2764.

[1,2] The Supreme Court, in *Thornburg v. Gingles*, acknowledged the totality of the circumstances approach and introduced an additional, threshold analysis to be used in challenges to at-large election systems. [3] As the Court stated, unless the

threshold factors are established by the Section 2 plaintiff, "the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice." 106 S.Ct. at 2766. Satisfying the threshold test, therefore does not prove a plaintiff's Section 2 claim; the district court must then

3. The *Thornburg* threshold analysis requires the plaintiffs to establish the following three circumstances;

(1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district;

(2) that the minority group is politically cohesive; and

(3) that the white majority votes sufficiently as a bloc to enable it — in the absense of special circumstances, such as the minority candidate running unopposed — usually to defeat the minority's preferred candidate.

See Thornburg, 478 U.S. at 50-52, 106 S.Ct. at 2766-67.

4. The district court here stated:

The United States Supreme Court through *Thornburg* has substantially altered the law applicable to the Voting Rights Act. The Supreme Court reduced the usefulness and materiality of the *Zimmer* factors on the issue of whether there is a violation of Section 2 of the Voting Rights Act. This Court questions the purpose of the *Zimmer* factors after *Thornburg* now that the focus of a Section 2 claim is on the *Thornburg* tripartite test of the geographic compactness and insular existence of the minority, majority bloc voting, and political cohesiveness of the minority.

688 F.Supp. at 261. This discussion misconstrues the legal effect of *Thornburg* on Section 2. The *Thornburg* threshold analysis does not replace the totality of the circumstances inquiry, the ultimate determination to be made under Section 2.

proceed to the totality of the circumstances inquiry.[4] *Cf. Overton v. City of Austion,* 871 F.2d 529 (5th Cir. 1989) (plaintiff may lose at the threshold step pretermitting need to conduct totality of circumstances test). In this case, the district court made findings both on the threshold factors and on the totality of the circumstances inquiry.

We conclude that the district court was not clearly erroneous in its determination that Woodville's electoral structure does not violate Section 2. In so doing, however, we must clarify the district court's analysis of the *Thornburg* threshold factors, which is vigorously attacked by appellants We affirm the district court's findings on the totality of circumstances test for a Section 2 violation.

III. FINDINGS UNDER THE THRESHOLD ANALYSIS

Appellants contend that the trial court's *Thornburg* analysis erred in its findings on the lack of political cohesion among the black voters and the legal significance of the white bloc vote. The first *Thornburg* factor, that the "minority" is sufficiently large and geographically compact to form a majority in a single-member district, concededly exists here. We review the district court's findings on the other two *Thornburg* factors by the standard of clear error. *Overton,* 871 F.2d at 533.

At the outset, we note that the district judge discounted the statistical evidence presented by the appellants as severely flawed.[5] The weaknesses he observed are particularly damaging to the appellants' case because this information constituted the bulk of their evidence on the issues of black political cohesiveness and white bloc voting. Dr. Love, appellants' statistical expert, faced difficulties in producing useful data for the court. Since Woodville uses only one precinct

5. The district court's opinion sets forth its criticisms of Dr. Love's data. *Monroe v. City of Woodville, Miss.,* 683 F.Supp. 255 (S.D. Miss. 1988)

in its elections, statistical methods such as ecological regression and "overlapping percentages," which require multiple precincts, cannot be used. Therefore Dr. Love examined 1983 and 1987 elections in Wilkinson County, which includes Woodville. We hae previously cautioned district courts to undertake "fact-specific assessments" of the relevance and probative value of exogenous election results. *Westwego Citizens for Better Govern. v. Westwego,* 872 F.2d 1201, 1208 n. 8 (5th Cir. 1989). Dr. Love's analysis of the 1987 county elections was further hampered by results that were not statistically significant because of large amounts of crossover voting. Additionally, as the district court noted, appellees' expert identified specific

flaws in Dr. Love's analysis: failure to provide a test of statistical significance;[6] failure to analyze certain relevant election contests; and mixing of data from primary and general elections.

A. *Political Cohesion*

[3] Based on the evidence before it, the district court concluded that the appellants did notrove political cohesion among the black voters in Woodville. That the appellants had the burden of proof on this issue is not disputed. *See Overton,* 871 F.2d 529, 543 (Jones, J., concurring). Appellants assert that this finding embodies an error of law as well as fact. They note that the district court accepted the parties' stipulation that both whites and blacks in Woodville vote along racial lines. According to appellants, *Thornburg v. Gingles, Campos v. City of Baytown,* 840 F.2d 1240 (5th Cir. 1988), and *Citizens for a Better Gretna v. city of Gretna,* 834 F.2d 496 (5th Cir. 1987), hold that if the district court finds that a minority group votes as a bloc for minority candidates, political cohesion within the minority group is proven. We

6. *See Overton v. City of Austin,* 871 F.2d 529, 544-45 (5th Cir. 1989) (Jones J., concurring) (statistical data presented to courts in Section 2 cases should include the results of tests for statistical significance).

disagree.

Thornburg does recognize that establishing "that a significant number of minority group members usually vote for the same candidates is *one way* of proving political cohesiveness...." 106 S.Ct. 2769-70 (emphasis added). Statistical proof of political cohesion is likely to be the most persuasive form of evidence, although other evidence may also establish this phenomenon. *Brewer,* 876 F.2d 448, 453 (lay testimony from members of the community on political cohesion might be sufficient). Nevertheless, courts must carefully examine statistical evidence of racial bloc voting to determine its relevance and probativeness to a finding of political cohesiveness. *Accord Overton v. City of Austin,* 871 F.2d 529.

Appellants err by implying that a finding of racial polarization in voting behavior is synonymous with a group's political cohesion. The terms are quite distinct. That a group's voting behavior is racially polarized indicates that the group prefers candidates of a particular race. Political cohesion, on the other hand, implies that the group generally unites behind a single political "platform" of common goals and common means by which to achieve them.[7] For example, the black population of a district may vote in a racially polarized manner so as to overwhelmingly favor black candidates, but the group may lack political cohesion if it splits its vote among several different black candidates for the same office. Where the black voters overwhelmingly favor a particular black candidate to the exclusion of others, data on racial bloc voting will be more probative to determining political cohesiveness.[8]

7. "Political cohesion" may well embody different meanings at the local level as compared to the state or national level. For instance, three candidates for mayor, although members of the same party, may campaign on separate, indeed conflicting, view of the issues. It is too facile to conclude that because these candidates and their party members may support common candidates in races in a different subdivision, e. g., county. Congressional or presidential, they are necessarily politically cohesive in a purely local election.

8. Where only one black candidate is running for an office at the local level, political cohesion may be indistinguishable from racial bloc voting, and the latter may provide evidence of the former. The weight of such evidence is a determination left to the district court.

Political cohesion is required under *Thornburg* for a fundamental reason. As the Court said, "if the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority interests." *Thornburg* 106 S.Ct. at 2767. Put otherwise, if the members of the minority community do not agree among themselves on basic political issues in their subdivision, their interests *as a minority* are not subverted by an at-large electoral system.

We turn, then, to the district court's finding that Woodville's blacks are not politically cohesive. The ambit of appellate review of this fact is limited. A finding is clearly

erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Blessemer City,* 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed. 2d 518 (1985) (quoting *United States v. United States Gypsum, Co.,* 333 U. S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently... This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson, 470 U. S. 564, 573-74, 105 S. Ct. 1504, 1511.

[4] In this case both parties can point to evidence in the record to support their positions. The 1983 elections show a strong degree of racial bloc voting by black residents, which could indicate political cohesion. On the other hand, the more recent results from the 1987 county elections indicate a significant degree of crossover

voting for white candidates by black citizens.[9] Crossover voting by a minority group does not preclude a finding of political cohesiveness *per se,* but its presence is relevant. The 1987 data, therefore, weigh against finding political cohesiveness. Dr. Love opined that Woodville's black residents were politically cohesive; Dr. Van Gelder, appellees' expert, disagreed. Testimony from black residents of Woodville also differed on this point.[10] Finally, we note that the inability of Woodville's black residents, who comprise over sixty percent of the city's voting age population, to put significant numbers of allegedly black preferred candidates in local office may further signal a lack of political cohesion.[11] Therefore, from the record before us, we cannot say that the district court clearly erred in its finding.

B. *Legally Significant White Bloc Voting*

The district court found that both white and black residents in Woodville engage in racial bloc voting. The determinative question for a Section 2 claim, however, is not whether whites generally vote as a bloc, but rather, whether such bloc voting is legally significant. In this case, the district court found that the white bloc vote was not legally significant.

Thornburg instructs that "Because... the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district." *Thornburg,* 106 S. Ct. at 2769. The Court then identified some factors to consider in conducting this evaluation. Among those are the nature of the allegedly dilutive electoral mechanism, the percentage of registered voters in the district who are members of the minority group,

9. Mississippi's anti-single-shot provision did not apply to county elections.

10. Two black witnesses testified that, in their view, the black residents of Woodville are not politically cohesive.

11. By contrast, a number of blacks have held public office in Wilkinson County in recent years.

and the size of the district. 106 S.Ct. at 2770. Based on such facts, *Thornburg* holds that white bloc voting will be legally significant where "the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances ... usually to defeat the minority's preferred candidate." *Thornburg*, 106 S.Ct. at 2767.

The district court evidently found it difficult, as do we, to analyze "legally significant" white bloc voting in a jurisdiction where blacks are the numerical majority. The court held:

> In the present case, the evidence shows that Blacks constitute the majority of the over-all population, of the vot-

> ing age population, and of the number of registered voters; the evidence does not support the Plainfifffs' arguments that the white bloc vote usually defeats the minority's preferred candidates. There is no "submergence of the minority" since minority citizens (Blacks) are actually in the majority in the City of Woodville. White candidates win not because of the white bloc vote, but because of the crossover vote. The Plaintiffs may have established a "white bloc vote", but they have not proved legally significant racial bloc voting for purposes of a Section 2 claim. If white bloc voting to a legally significantly degree is not proven, minority voters have not established that the challenged electoral structure interferes with their ability to elect their preferred candidates.

Appellants assert that white bloc voting, rather than black crossovers, is responsible for the historical defeat of Woodville's black candidates. Consequently, they interpret the district court's opinion as essentially precluding Section 2 claims whenever a minority group constitutes a majority of the population. If the district court's opinion so held, it would be wrong. Unimpeachable authority from our circuit has rejected any *per se* rule that a racial minority that is a majority

in a political subdivision cannot experience vote dilution. *Zimmer v. McKeithen,* 485 F.2d at 1303. *Zimmer* relied upon the Supreme Court's decision in *White v. Regester,* 412 U.S. 755, 93 S. Ct. 2332, 37, L. Ed. 2d 314 (1973), which affirmed a finding of racial vote dilution in Bexar County, Texas, even though Mexican-American plaintiffs constituted a numerical majority there. *See Graves v. Barnes,* 343 F. Supp. 704, 733 (W.D. Tex. 1972) (three-judge panel), *aff'd sub nom. White v. Regester,* 412 U. S. 755, 93 S. Ct. 2332 (1973). The caveat should be added that in *Zimmer,* at least, the black majority had recently been freed from literacy tests and impediments to voting registration. As *de jure* restrictions on the right to vote mercifully recede further into the historical past, we should expect it to be increasingly difficult to assemble a *Zimmer*-type voting rights case against an at-large electoral district where a minority-majority population exists. Such a case is not, however, precluded as a matter of law.

A subtle error plagues the appellants' disagreement with the district court. The quoted portion of its opinion refers not to any general principle of illegal vote dillution but to the specific *Thornburg* threshold inquiry whether the white bloc vote is legally significant, *i.e.* whether it usually operates to defeat the black candidates. This narrower issue discussed by the district court requires a more focused attack than that levied by appellants. It seems possible to argue *both* (1) that a § 2 vote dilution violation may occur even if a minority is more populous in a political jurisdiction and (2) that *Thornburg's* threshold criterion of legally significant white bloc voting does not deal with such a circumstance. Thornburg repeatedly described the submergence of black voters by a white majority. *See e. g.* 106 S. Ct. at 2764, 2765, 2767. The terms "majority" and "minority", in context, refer not only to the relative number of blacks and whites in our general population but to their relative representation in the electoral district being challenged. Discussing its criterion of legally significant white bloc voting, the court explains.

In establishing this last circumstance, the

minority group demonstrates that *submergence in a white multimember district* impedes its ability to elect its chosen representatives. 106 S. Ct. at 2767 (emphasis added).

In light of *Thornburg's* emphasis when enunciating its threshold standards, that a vote dilution Section 2 claim depends upon a black minority submerged within a white majority, we can readily appreciate the district court's conclusion that Woodville did not experience "legally significant" white bloc voting in part because of the black majority population. Whether this prong of *Thornburg* was intended to address the case before us is a matter of speculation among several possible interpretations. The issue is, however, ultimately irrelevant because irrespective of *Thornburg's* meaning in a case like this, *Zimmer's* holding clearly was not abandoned when Congress amended Section 2.

Because we have already concluded that a *Thornburg* vote dilution claim is foreclosed here by lack of black political cohesion, and we conclude in the following discussion that a *Zimmer* totality of circumstances dilution claim was not proven by appellants, we need not opine further on this puzzling aspect of *Thornburg*.

IV. THE TOTALITY OF THE CIRCUMSTANCES TEST

[5] Responding to appellant's final point, we must review whether the district court was correct in its finding that Woodville's multimember districting scheme does not run afoul of the totality of the circumstances test required by Section 2. In the court's words, the appellants had failed to prove "that the political processes leading to nomination or election in the City of Woodville are not equally open to participation by black voters or that Blacks have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 688

F. Supp. at 264. The court's misreading of the proper relationship between *Thornburg* and Section 2 (addressed in Part II of our opinion) is not fatal to its fact finding, because the court proceeded to address each of the *Zimmer* factors[12] and made specific findings as to each. The district court then combined its analysis of the *Zimmer* factors and the three *Thornburg* factors to reach its ultimate finding under the "totality" test.

Once again, our review is limited to a determination of whether the district court's findings were clearly erroneous. The district court found that before 1965 discrimination prevented black citizens of Woodville from fully participating in the electoral process; that voting had been polarized along racial lines; that socio-economic disparities existed between Woodville's black and white residents; that few blacks had been elected in the City of Woodville; and that the black population in Woodville was sufficiently large and geographically compact to allow the creation of single-member district with majority black voting age populations. The court balanced these findings against its other findings, namely: that there was no candidate slating process in Woodville; that overt or subtle racial appeals were absent in political campaigns within the City; that Woodville's elected officials had adequately responded to the needs of the black residents, that Woodville's small size resulted in a multimember district which was not unusually large so as to hinder the opportunity of blacks to elect representatives of their choice; that the anti-single-shot provision had been repealed; that black residents constituted a majority of Woodville's voting age population; that blacks crossed over to vote for white candidates to a large degree; that blacks served in many public offices in the surrounding Wilkinson County; and that the plaintiffs had failed to prove political cohesion

12. The district court also examined the responsiveness of Woodville's elected officials to "the particularized needs of the minority group." This additional evaluation was specifically approved by Congress. *See* S. Rep. No. 417, *supra* at 207. For purposes of Part IV, our references to the *Zimmer* factors include the responsiveness criterion. As we noted in Part II, district courts have a wide latitude in the kinds of indicia to examine in a Section 2 claim.

among black residents or legally significant white bloc voting. The court also noted that Woodville's black community is very active politically.[13] The role of the district court is to make a "searching and practical evaluation" of the election system being challenged. Because its comprehensive individual findings find support in the record, we cannot say that its ultimate finding under the totality of the circumstances test is clearly erroneous.

Thornburg's endorsement of a "functional view" of the political structure of the jurisdiction involved is particularly relevant to this case. Based solely on the observation that black candidates have been largely unsuccessful in past Woodville elections despite their constituting a voting age majority of the community, our prior panel was initially inclined to suspect that the town's electoral structure might violate Section 2. But reliance on a merely visceral response is inadequate and inappropriate in today's Voting Rights Act cases. Exam-

ination of the trial record increases our confidence in the district court's decision.

Since "the theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters,"[14] appellants, in challenging Woodville's electoral system, are at a distinct disadvantage. "Minority voters who contend that the multimember form of districting violates § 2, must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates." *Thornburg,* 106 S. CT. at 2765. If there truly is a black preferred candidate, or set of candidates, the roughly twenty percent margin of

13. For example, in the May 1985 democratic primary, 86% of the registered voters voted.

14. *Thornburg,* 106 S. Ct. at 2765.

numerical superiority in voting age population should provide the black residents with a sufficient opportunity for success at the polls. At least this court, along with our sister circuits, has so held in fashioning legal remedies.[15] Thus, there is now no discernible structural impediment to black success at the polls.

V.

The appellants raise two additional points of error in the district court's decison. First, appellants argue that the court's alternatively holding is barred by the law of the case. The district court held atlernatively that even if Woodville's electoral structure violated Section 2, no remedy would be proper or necessary because its black residents are the decisive voting-age majority. This statement comes close to flouting the contrary decision of our court in reversing the previous summary judgment awarded to Woodville. We need not address the law of the case doctrine, however, in view of our affirmance of the judgment on the merits of the case.

Second, appellants argue that the district court, on several occasions, ignored substantial evidence contrary to its decision. *See Velasquez v. City of Abilene, Texas,* 725 F.2d 1017, 1020 (5th Cir. 1984) Specifically, appellants claim that the district court ignored evidence that city officials do not repair streets in black neighborhoods as compared to white neighborhoods and that officials at City Hall are not as responsive to the needs of blacks as to those of white. Having carefully

15. *See, e.g. Jordan v. Winter,* 604 F. Supp. 807, 814-15 (N. D. Miss.) (three-judge panel) (52.8% black voting-age population sufficient to overcome past discrimination and provide equal opportunity for minority candidates to participate in elections), *aff'd sub. nom, Mississippi Republican Executive Comm. v. Brooks,* 469 U. S. 1002, 105 S. Ct. 416, 83 L. Ed. 2d 343 (1984); *Ketchum v. Byrne,* 740 F. 2d 1398, 1413-15 (7th Cir. 1984) (endorsing a 60% voting age population figure for minorities as a target remedy to ensure minorities a fair opportunity to elect a candidate of their choice), *cert. denied sub. nom. City Council of the City of Chicago v. Ketchum,* 471 U. S. 1135, 105 S. Ct. 2673, 86 L. Ed. 2d 692 (1985).

reviewed the record, we agree with the implicit finding of the district court that there was no substantial evidence of these charges at trial. The appellants also claim that the district court overlooked the minimal success of black candidates for public offices in Woodville. On the contrary, the district court noted in its opinion that only one black aldermanic candidate had been successful up to 1985. Having conducted its balancing test mindful of Woodville's unimpressive showing of black candidate success, the district court should not be required to elaborate further on this point.

For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX B

MONROE v. CITY OF WOODVILLE, MISS.
Cite as 688 F. Supp. (s. D. Miss. 2988)

John MONROE, et al, Plaintiffs,

v.

CITY OF WOODVILLE, MISSISSIPPI, Defendant.

Civ. A. No. W85-0088(B).

United States District Court,
S. D. Mississippi, W. D.

June 15, 1988

Black voters brought action challenging at-large aldermanic election system in city alleging that system diluted voting strength of blacks. The United States District Court for the Southern District of Mississippi, 636 F. Supp. 423, dismissed action, and voters appealed. The Court of Appeals, 819 F.2d 507, reversed and remanded. The District Court, Barbour, J., held that at-large system of electing aldermen in city did not dilute voting strength of blacks in violation of Voting Rights Act.

Judgment in favor of city.

1. Elections — 12(3)

To establish claim of vote dilution, minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in single-member district, minority must be able to show that is it politically cohesive, and minority must be able to demonstrate that the white majority vote sufficiently as a bloc to enable majority usually to defeat minority's preferred candidate. Voting Rights Act of 1965, § 2, as amended, 42 U.S.Ca. § 1973.

2. Election — 12(3)

Number of elections that must be studied to determine whether voting is polarized and whether there is violation of Voting Rights Act will vary according to pertinent circumstances. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

3. Elections — 12(3)

If white bloc voting to a legally significant degree is not proven, minority voters have not established that challenged electoral structure interferes with minority's ability to elect their preferred candidates and have failed to establish Voting Rights Act violation. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

4. Municipal Corporations — 80

At-large system of electing aldermen in Mississippi city did not impede blacks in their opportunity and ability to participate in political process and to elect representative of their choice and did not constitute vote dilution under the Voting Rights Act; blacks constituted majority of overall population, of voting age population, and of number of registered voters, evidence did not support blacks' arguments that white bloc vote usually defeated minority's preferred candidate, and black voters were not politically cohesive. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

Willie L. Rose and Deborah McDonald, Southwest MS Legal Services, McComb, Miss., for plaintiffs.

Richard T. Watson, Woodville, Miss., Dennis L. Horn, Jackson, Miss. for defendant.

OPINION

BARBOUR, District Judge.

Introduction

This unusual vote dilution case is brought under Section 2 et seq. of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973 et seq., the Thirteenth, Fourteenth and Fifteenth Amendments to the United

States Constitution, and 42 U.S.C. §§ 1981, 1983 and 1985. The Plaintiffs are black registered voters of the City of Woodville, Mississippi. Plaintiffs allege that the city's at-large electoral system whereby all of the aldermen are elected at large dilutes black voting strength. They seek to have the city divided into four single-member electoral districts so that each of the four aldermen is elected from a separate ward. This Court earlier granted summary judgment to the Defendant on the basis that the black voting age population of 60.5% constituted an effective ma-

jority for which no remedy existed. *Monroe v. City of Woodville, Mississippi,* 636 F. Supp. 423 (S.D. Miss. 1986). The Court of Appeals reversed and remanded for trial. *Monroe v. City of Woodville, Mississippi,* 819 F.2d 507 (5th Cir. 1987). This Court having now conducted a trial of the matter and having considered the evidence and arguments of counsel, renders these findings of fact and conclusions of law.

Findings of Fact

Woodville, Mississippi, is a town of 1512 persons in Wilkinson County, Mississippi. Wilkinson County is in the extreme southwest corner of the State of Mississippi, the western boundary of which is the Mississippi River. Wilkinson County has a population of 10,021 of which 66.9% is Black. The population of Woodville is 64.3% Black. Of the voting age population of Woodville, 60.5% is Black.

Woodville is one mile square in size. Although Woodville is very small in size geographically and there are some racially mixed neighborhoods, Blacks are concentrated in two neighborhoods in the northwestern part of town and in one neighborhood in the south central portion of town.

Wilkinson County and Woodville lie in one of the most rural, impoverished and economically depressed areas of the State of Mississippi. The economy of the area is based primarily on the timber industry. The predominant employer in Woodville is a sawmill which

employs 40 to 50 black laborers and a few Whites in management. Thirty nine and seven-tenths percent of the black families and 10% of the white families in Wilkinson County, Mississippi, have incomes below the poverty level. Sixty percent of the working age Whites and 45% of the working age Blacks in Wilkinson County are in the labor force. In 1986 the unemployment rate was 8% for Whites and 24.8% for Blacks. Plaintiffs made much of the few managerial positions held by Blacks. Twenty-four percent of the Whites and 5% of the Blacks in Wilkinson County are employed in managerial and specialty occupations. Because of the depressed economy of the area, there are very few managerial positions available for either Blacks or Whites. Most of the white managerial positions are sole proprietorships or small family businesses. In Wilkinson County there are 3.44 persons living in each unit of black housing and 2.6 persons living in each unit of white housing. Although most businesses are owned by Whites, Blacks are employed in jobs such as grocery store cashiers and bank tellers.

The black population percentages in the City of Woodville for the past four censuses have been as follows: 1950 census, 51.0%; 1960 census, 59.0%; 1970 census, 64.0%; 1980 census, 64.3%.

Woodville has a mayor-alderman form of government under which the mayor and all four aldermen are elected at large. There are no designated posts. There is a majority vote requirement for being elected to the board of aldermen in Woodville. Since 1969 there has been no Republican candidate for alderman. Also since that date the four Democratic candidates for alderman who received the most votes in each primarily election also received a majority of the votes cast and accordingly were nominated without a run-off election. Each of those was thereafter elected during the general election without opposition.

The Defendants stipulated that before 1965 there was de jure segregation which prohibited Blacks from participating in the electoral process in Woodville and Wilkinson County, Mississippi.

Prior to January 1, 1987, the election code for the State of Mississippi required voting for as many candidates as there were persons to be elected to each office or the ballot would be rendered void. However, effective January 1, 1987, the Mississippi legislature repealed the "anti-single-shot" statutory requirement in municipal elections., *Miss. Code Ann.* § 21-11-15 (Supp. 1987), so that now single-shot or bullet voting is allowable in all municipal elections in Mississippi, including Woodville elections. The Mississippi legislature abolished dual county-city registration as of August 3, 1984, *see Miss. Code Ann.* §§ 21-11-3, 23-5-303(3) (Supp. 1987), but county-only registrations prior to that date

do not allow city voting without separate registration in the city.

There is no formal or informal candidate slating process in Woodville, Mississippi.

Although there have been black candidates for aldermen since 1969, only one black person, Charles James, has been elected as alderman in Woodville; he was first elected in 1981 and reelected in 1985. Black candidates have been more successful in Wilkinson County elections. The black Superintendent of Education has been elected three times and the black Chancery Clerk has been elected twice. Currently three of the five supervisors are black.

There is almost total social segregation of Blacks and Whites in Woodville and Wilkinson County. The public schools are attended only by black children; white children attend a private academy. The city operates a public swimming pol which is used only by Blacks. Whites use a privately owned pool. The city operates a public park which is used almost exclusively by Blacks. Although the one restaurant in town is open to Blacks and a few Blacks patronize it, that restaurant is used primarily by Whites.

On the other hand, there has been no direct proof or

even inference of any substantial racial unrest, conflict or tension in either Woodville or Wilkinson County in recent years. Political campaigns have not been characterized by overt or subtle racial appeals. Although one of the Plaintiffs testified that there was an "unwritten rule" that Blacks should not go into white neighborhoods, that testimony was not credible in the face of testimony by black candidates that they have campaigned door-to-door throughout Woodville visiting every residence, black and white, without repercussion or even feeling uncomfortable.

The same witness for the Plaintiffs also complained of problems in registering black citizens in Woodville, Mississippi. He testified that when he was running for mayor and later for alderman he too black citizens to city hall to register and there experienced an intimidating atmosphere. When pressed on cross-examination, the strongest intimidation to which he could testify was a vague reference to the clerk's "frowning" at him. In stark contrast to this weak evidence are the facts that there is a deputy-clerk in the registration office who is a black person; that other Blacks who have run for office specifically testified that they experienced no intimidation when they took, black people to be registered; and, that of the 826 registered voters in Woodville, 428 are Black and 364 are White (the race of the remaining 34 could not be determined)[1]. Nor was there any evidence of intimidation at the polls. In the May 14, 1985, democratic primary in Woodville 711 persons voted, 355 of whom have been identified as Black and 257 of whom have been identified as White. (The race of the remaining 99 was not identified).

There is no lack of responsiveness on the part of elected officials in Woodville, Mississippi, to the particularized needs of the black community. Woodville has employed Blacks, including a Black in a managerial

1. The chief of police who identified the race of the registered voters testified that he felt he knew all of the white voters either personally or by family. If the 34 registered voters whose race is undetermined are Black, 55.9% of the registered voters are Black. If those 34 are all White, 51.8% of the registered voters are Black.

position as Superintendent of Utilities, Blacks as four of its five police officers, and a Black as one of its two deputy city clerks. Garbage collection, utilities and police services are provided equally. The Plaintiffs attempted to make a case of unequal responsiveness to the needs of the black community but failed to present any substantial proof. Several of the Plaintiffs' witnesses testified that the roads were not equal based on the fact that the roads in Kaighler's Bottom, a black neighborhood, were narrower than those in white areas of town. The proof showed that the city had no control over the width of the streets in that area because only a very narrow street right-of-way was provided when the houses were originally

built. There were not complaints that the streets throughout town were maintained differently in black and white areas an all streets within the town in both the black and white neighborhoods are paved. Even less persuasive testimony was presented by the Plaintiffs regarding unequal provision of utilities to Blacks. One of the Plaintiffs' witnesses testified that utilities cost more to Blacks than to Whites. The Superintendent of Utilities, who is himself black, specifically denied this and testified that all utility rates were exactly the same. It appears that the Plaintiffs' witness simply had contested a utility bill of his own which he had thought had been too high.

In order to meet the proof requirements of *Thornburg v Gingles,* 478 U. S. 30, 106 S. Ct. 2752, 92 L. Ed.2d 25 (1986), the law of which will be discussed later, Plaintiff called as an expert witness Dr. Ronald Love, an assistant superintendent of schools at Tupelo, Mississippi, who has a doctorate in applied sociology and comparative sociology. He qualified as an expert in racial bloc voting and statistics. Dr. Love attempted to make an ecological correlation and a regression analysis of elections in Woodville. The Court does not mean to disparage Dr. Love's training or ability; however, he was working under three adverse circumstances: First, Dr. Love was initially presented with incomplete and incorrect data with which to do his study. He admitted

this on the stand and, in answer to the Defendants' interrogatories regarding expert opinions, submitted first one written report and then an amended one after the first was withdrawn. Second, Woodville presents a difficult situation under which to make a valid statistical analysis of racial bloc voting for the unique reason that it has only one precinct in the entire town. Third, because Dr. Love was forced into trying to make a statistical analysis within Woodville by analyzing Wilkinson County election results, and because Blacks enjoyed considerable electoral success in the most recent county-wide elections held in 1987, he had to either soften his conclusions as to racial bloc voting by including an analysis of the 1987 county elections or eliminate the 1987 results from his study. In any other case in which the plaintiff has the burden of proof which not must necessarily rest upon expert testimony, such as in a medical malpractice case, and if the court were presented with the same quality of expert proof as presented in this case, the Court could simply say that the plaintiff had failed to carry its burden of proof. However, vote dilution cases are unique in that it is universally recognized that racial bloc voting does exist in the sense that most white voters vote for the white candidate and most black voters vote for the black candidate in elections in which candidates of both races are running. Accordingly, here this Court will specifically address the testimony of Dr. Love and his stated opinions.

In opposition to the expert testimony offered by the Plaintiffs the Defendant presented Dr. Craig Van Gelder. Dr. Van Gelder did not conduct his own analysis from original data of racial bloc voting. He limited his testimony in regard to bloc voting to a criticism of Dr. Love's testimony and stated that he could not have offered a professional opinion and would not offer such an opinion based upon the data base and methodiolgy used by Dr. Love.

In making his regression analysis, Dr. Love used as his independent variable the black voting age population. Dr. Van Gelder testified and Dr. Love agreed

that this was the third best date to use for the independent variable. The best data would have been actual turn-out data as might have been collected by exit polls. This data was non-existent. The next best data would have been the percentages of black voters to white voters among registered voters. This data could have been obtained but was not. Dr. Van Gelder accordingly testified that the use of the black voting age population softened the conclusions of Dr. Love.

Based upon the weaknesses in the date and statistical methodology evident from Dr. Love's testimony and from the criticism of his testimony by Dr. Van Gelder, the Court makes the following observations. Dr. Love based his analysis only upon the 1983 county elections involving Woodville

precincts and did not use in his final analysis the 1987 elections which were available to him. He also mixed primary elections with general elections without separate analysis. The results which he reached differed between his initial report and his final report, at least in part because of incomplete data. These matters raise questions as to the validity of his conclusions.

The statistical methodology used by Dr. Love was incomplete since he did not incorporate all available data, since he did not check original sources and eliminate errors, and since he was unable to use an overlapping percentages, or homogeneous precinct, analysis because there was only one precinct within the City of Woodville. Dr. Love did try to use an overlapping percentages analysis by using a county precinct which contained a portion of the city. However, that precinct could only be used for checking county elections and only 10% of the population of that county precinct resided within the City of Woodville.

Because Dr. Love was forced into analyzing county elections, he formulated as his basic premise that the City of Woodville and Wilkinson County share similar demographic features and therefore the analysis of

Wilkinson County voting tendencies is applicable to the City of Woodville itself. It is interesting to note that Dr. Love specifically testified that Wilkinson County provides equal access to the political process for Blacks based upon the success of black candidates. He testified that the only clear factors differentiating city voting practices from county voting practices were anti-single-shot voting provisions in the city, which have been repealed, and the city's at-large system.

Dr. Love was cross-examined at considerable length regarding his scattergram prepared as a part of his regression analysis. In contrast to the scattergram and explanation thereof continued in *Campos v. City of Baytown, Texas*, 840 F.2d 1240, 1247 & n. 11, apps. A & B (5th Cir. 1988), the sloping line of Dr. Love's scattergram does not intersect the verticals on either side of the scattergram but begins at the zero coordinates. He testified that the point of reference in his scattergam were only estimates. The Court concludes that the scattergram and the analysis which it purposes to make are so general as to be on no assistance to the Court. Although the Court has criticized Dr. Love for analyzing county races rather than city races, the Court does note that as stated above Black candidates have enjoyed considerable success in obtaining election to county offices.

Although Dr. Van Gelder did not make a full study, he did give an opinion based on an extensive hypothetical question to which there was no objection to the factual basis by the Plaintiffs. His opinion was that bloc voting by Whites usually would not be able to defeat Blacks in selecting candidates of their choice, that Blacks have not been able to elect Blacks within Woodville because they are not politically cohesive, and that Blacks are crossing over to elect Whites in significant numbers. There is direct evidence supporting these opinions. The Democratic primary election results of May 14, 1985, show that Charles James, a Black, received 405 votes for alderman and placed third. William A. Ward, the other Black in the race, received only 281 votes and placed fifth out of the seven

candidates. The fourth place candidate, Andy J. Lewis, received 401 votes, which were considerably more votes than that received by Ward.

There was no real contest presented by the Defendants to the Plaintiff's proposition that Whites in Woodville bloc vote to a significant degree for white candidates when white candidates are opposed by black candidates. The legal standard which the Plaintiffs had to prove, however, was whether there is *legally significant* racial bloc voting, that is a white bloc vote that normally will defeat the combined strength of minority support plus white crossover votes. The Court accordingly concludes as a matter of fact that in Woodville white voters vote for white candidates and that black voters bloc vote for black candidates but that black voters cross over to vote for white candidates in significant numbers so that they are not politically cohesive.

Plaintiffs presented no evidence in support of their motion to proceed with this suit as a class action. The Court's ruling on this motion had been carried with the trial of the case.

The Court in applying the law to this case is confronted with a somewhat unusual Voting Rights Act, single-member district case. Woodville is a small, rural, economically depressed town with an at-large system of electing its aldermen. It has a past history of racial discrimination as does every other Mississippi town or city. It remains a place of almost total racial segregation on a social level. On the other hand, Blacks and Whites are operating a government which is fair and responsive to Blacks in a community atmosphere of cooperation between the races and devoid of intimidation.

CONCLUSIONS OF LAW

The Court concludes that the Plaintiffs failed to make out a class action under Rule 23 of the Federal Rules of Civil Procedure, and the Court will deny the Motion to proceed as a class action.

The Plaintiffs have proceeded on their claims only

under Section 2 of the Voting Rights Act as amended, 42 U.S.C. § 1973. They have not advanced any other constitutional or statutory arguments in the trial of this matter.

> Congress substantially revised Section 2 of the Voting Rights Act in 1982 to make clear that a violation could be proven by showing a discriminatory result or effect alone without proof of a discriminatory purpose. Section 2 as amended provides:
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.
>
> 42U.S.C. § 1973.

Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d25 (1986), addressed the 1982 Amendments to Section 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973. The 1982 Amendments and *Thornburg* focused

on a "results" test when analyzing whether challenged election systems dilute minority voting strength. The Supreme Court discussed certain factors or circumstances which might be probative of a Section 2 violation which were contained in the Senate Judiciary Committee Majority Report to the 1982 Amendments[2].

These factors have been termed the *Zimmer* factors

2. The court in *Thornburg* set forth these factors:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. The extent to which voting in the elections of the state or subdivision is racially polarized.
>
> 3. The extent to which the state or political subdivision has use unusually large election district, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. The extent to which members of a minority group in a state or political subdivision bear the effect of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. Whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Thornburg, 478 U.S. at 36, 41, 106 S. Ct. at 2759, 2762, 92 L. Ed.2d at 38, 42; S. Rep. 28-29. The Senate Report also mentioned additional factors that in some cases would have probative value to establish a violation. These are:

> A. Whether there is a significant lack of responsiveness on the part of elected official to the particularized needs of the members of the minority group.
>
> B. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id., 478 U. S. 36, 106 S. Ct. at 2759, 92 L.Ed. 2d at 38; S.Rep. 28-29.

since they were refined and developed in *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973), *aff'd. sub nom East Carroll Parish School Board v. Marshall,* 424 U. S. 636, 96 S. Ct. 1083, 47 L. Ed2d 296 (1976) (per curiam). These factors were not intended to be comprehensive or exclusive, but merely to espouse a flexible fact-intensive test of Section 2 violations. *See Houston v. Haley,* 663 F. Supp. 346, 350 (N. D. Miss. 1987).

The United States Supreme Court through *Thornburg* has substantially altered the law applicable to the Voting Rights Act. The Supreme Court reduced the usefulness and materiality of the *Zimmer* factors on the issue of whether there is a violation of Section 2 of the Voting Rights Act. This Court questions the purpose of the *Zimmer* factors after *Thornburg* now that the focus of a Section 2 claim is on the *Thornburg* tripartite test of the geographic compactness and insular existence of the minority, majority bloc voting, and political cohesiveness of the minority. [See *infra* Section II]. Although the *Zimmer* factors may evidence causes of cohesiveness or bloc voting, this Court has observed that these factors may be more useful in the remedy phase of a Section 2 claim when considering whether the guideline of 65% black population or 60% black voting age population should be enhanced.

Although the proper emphasis is now on the *Thornburg* tripartite test, courts have continued to analyze the *Zimmer* factors. This Court has also received evidence of the pertinent *Zimmer* factors and will treat them as part of the "totality of the circumstances" to be considered along with the *Thornburg* tripartite test for determining whether there is a violation of Section 2 of the Voting Rights Act.

I. ZIMMER FACTORS

In the present case the evidence established the following facts concerning the above enumerated

Zimmer factors.

A. *Historical Discrimination*

The parties stipulated that before 1965 there was de jure segregation and some discrimination which prohibited Blacks from fully participating in the electoral process in Woodville.

B. *Racially Polarized Voting*

The Court has noted the difficulty in using the Report and Statistical Analysis of Racial Polarization made by the Plaintiffs' expert. The Court finds that there is obvious polarization of voting along racial lines, but there is much cross-over voting by Blacks for white candidates. The voting may be characterized as polarized, but the Court will analyze in Section II of this Opinion whether their is *legally significant* racial bloc voting such that the bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular, minority group. *Thornburg,* 478 U. S. at 48-50, 106 S. Ct. at 2766. In the City of Woodville, the "minority," that is, the black voters, are actually the numerical majority. The Court finds that black voters in the City of Woodville are not politically cohesive and white bloc voting does not usually defeat the minority's preferred candidate.

C. *Use of Voting Practices Which May Enhance the Opportunity for Discrimination*

With a one mile square town, the Court finds that the election district is not un-

usually large so as to hinderthe opportunity for Blacks to elect candidates of their choice. State election laws provide that a majority vote is required to win party nomination. The Plaintiffs have not argued that the majority vote provision impermissible promote discrimination. The anti-single-shot statutory provision previously in effect has now been repealed. *See Miss. Code Ann.* § 21-11-15 (Supp. 1987).

D. *Candidate Slating Process*

There has been no proof of a candidate slating

process within the City of Woodville.

E. *Socio-Economic Disparities*

As stated in the Findings of Fact, there are socio-economic disparities between Blacks and Whites in the City of Woodville. These disparities are more than off-set by the numerical advantages held by Blacks in both population at-large and voting age population.

F. *Racial Appeals During Political Campaigns*

Political campaigns within the City of Woodville are not characterized by overt or subtle racial appeals. There was testimony that black candidates have campaigned door-to-door throughout Woodville visiting every residence, back and white.

G. *Extent to Which Blacks Have Been Elected to Public Office*

The evidence established that Blacks have been elected to public offices in the City of Woodville, and they serve in many public offices in Wilkinson County.

H. *Responsiveness*

The evidence established no lack of responsiveness on the part of elected officials in Woodville to the needs of the black citizens.

II. TRIPARTITE TEST

[1] The United States Supreme Court in *Thornburg* held that although the above enumerated factors are relevant in analyzing the "totality of the circumstances" to a claim of vote dilution, unless there is a conjunction of the following three circumstances the use of multi-member or at-large districts generally will not impede the ability of minority voters to elect representatives of their choice. *Thornburg*, 478 U. S. at 47-50, 106 S. Ct. at 2665-66. This has come to be known as the *Thornburg* tripartite test.

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially, integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its

> candidates... Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multi-member electoral structure thwarts distinctive minority group interests... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed — usually to defeat the minority's preferred candidate.

Thornburg, 478 U. S. at 50-51, 106 S. Ct. at 2766-67.

Under the *Thornburg* tripartite test, Plaintiffs must prove they are sufficiently large and geographically compact to constitute a majority in a single-member district. The evidence presented in this case demonstrates that Blacks can constitute a geographically compact and insular group. *See* Exhibits P-1, P-15.

Since the United States Supreme Court decided *Thornburg,* the United States Court of Appeals for the Fifth Circuit has addressed Section 2 of the Voting Rights Act in two cases: *Citizens for a Better Gretna v. City of Gretna, Louisiana,* 834 F. 2d 496 (5th Cir. 1987) and *Campos v. City of Baytown, Texas,* 840 F.2d 1240 (5th Cir. 1988). In *Gretna* and *Campos* the Fifth Circuit looked at the Zimmer factors as a foundation for the analytic framework prescribed for Section 2 claims. The opinions, however, primarily focused on the statistical analyses involved in determining racial bloc voting and political cohesiveness

for the tripartite test of *Thornburg.* As the Supreme Court clearly stated in *Thornburg,* "The Purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Thornburg,*

478 U. S. at 56, 106 S. Ct. at 2769; *Campos*, 840 F.2d at 1244; *Gretna*, 834 F. 2d at 500. Statistical methods of bivariate ecological regression analysis and extreme case analysis were used and approved in *Thornburg*, but the Fifth Circuit has noted that the Supreme Court did not mandate any particular statistical method for evaluating vote dilution claims. *See Gretna*, 834 F.2d at 500.

[2] The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. *Houston*, 663 F. Supp. at 351. One important circumstance is the number of elections in which the minority group has sponsored candidates. *Id.* In the case subjudice, election results from Woodville municipal elections were offered for the years 1969 through 1985. *See* Exhibit P-2. In each election year a black candidate ran for office. The Plaintiffs also offered evidence of county elections for 1983 and 1987 in which Blacks ran. Since the existence of only one precinct within the City of Woodville prevented any significant statistical analyses of municipal elections, the Plaintiffs' expert concentrated only on the 1983 county election for his statistical analysis because the 1987 elections involved much cross-over voting.

In *Gretna* and *Campos* the district courts made explicit finding on the statistical evidence presented.[3] This court has previously found that Dr. Love's statistical data and methodology were impaired and Dr. Van Gelder did not conduct an analysis of his own. It would be pointless for this Court to set out the statistical data and conducts its own analysis. The parties stipulated that the white voters in Woodville to a great degree vote for white candidates and black voters generally vote for black candidates although their are more crossover votes by Blacks. The Court has sufficient general data on which to rely without the specific findings of the statistical analyses.

Again, *Thornburg* defines legally significant racial bloc voting as white majority bloc voting that defeats

3. See Campos, 840 at 1246-48 & n. 9; *Gretna*, 834 F.2d at 501 nn. 11 & 12.

minority preferred candidates.*Thornburg*, 478 U. S. at 51, 106 S. Ct. at 2767; *Campos*, 840 F. 2d at 1248; *Gretna*, 834 F.2d at 502. As explained by the United States Supreme Court, "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Thornburg*, 478 U. S. 56, 106 S.Ct. at 2770. The plaintiffs' attorney argued that back crossover vote for white candidates should be counted with the white bloc vote, but there is no authority to support this proposition. The cases clearly demand that the court consider only whether the white *bloc vote* usually defeats the black vote plus white crossover votes. *See id.; Campos*, 840 F.2d at 1248.

[3, 4] In the present case, the evidence shows that Blacks constitute the majority of the over-all population, of the voting age population, and of the number of registered voters; the evidence does not support the Plaintiffs' arguments that the white bloc vote usually defeats the minority's preferred candidates. There is no "submergence of the minority" since minority citizens (Blacks) are actually in the majority in the City of Woodville. White candidates win not because of the white bloc vote, but because of the black crossover vote. The Plaintiffs may have established a "white bloc vote", but they have not proved legally significant racial bloc voting for purposes of a Section 2 claim. If white bloc voting to a legally significantly degree is not proven, minority voters have not established that the challenged electoral structure interferes with their ability to elect their preferred candidates. *Houston*, 663

F. Supp. at 350; *see also Thornburg*, 478 U. S. at 48-49 n. 15, 106 S. Ct. at 2766 n. 15.

The evidence presented also leads this Court to conclude that black voters in the City of Woodville are not politically cohesive. The Plaintiffs' expert, Dr. Love, admittedly did not focus on the most recent county election in which Woodville citizens participated since the data revealed that there was a large black crossover

vote for white candidates. *See* Exhibit P-17. The parties' experts testified that there is no set measure for determining political cohesiveness. Given the evidence that there has been consistent, substantial, crossover voting by black voters for white candidates, the Court finds that the black citizens in the City of Woodville are not politically cohesive.

CONCLUSION

The ultimate finding of minority vote dilution is to be based on the totality of the circumstances combining the *Zimmer* factors and the *Thornburg* tripartite test. Under the language of Section 2(b) and considering the totality of the circumstances, this Court finds that Plaintiffs have failed to prove that the political processes leading to nomination or election in the City of Woodville are not equally open to participation by black voters or that Blacks have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The Court therefore finds that the at-large system of electing aldermen in the City of Woodville does not impede Blacks in their opportunity and ability to participate in the political process and to elect representatives of their choice. This system therefore does not violate Section 2 of the Voting Rights Act.

If this Court is in error in holding that the at-large system of electing the board of aldermen does not violate Section 2, it readapts its earlier ruling made on Defendants' Motion for Summary Judgment that no remedy is necessary or proper. In vote dilution cases involving single-member election districts, the Courts have developed guidelines that minority districts should be designed so that they have either a black population of at least 65% or a black voting age population of at least 60%. *See Ketchum v. Byrne*, 740 F.2d 1398, 1413-16 (7th Cir. 1984). This advantage is given in order to overcome the problems caused by the Zimmer factors so that the Blacks of the district can elect representatives of their choice. Adoption of a guideline necessarily implies the possibility of departing from that guideline

under certain circumstances. Those circumstances would include exaggeration of one or more of the *Zimmer* factors. Although this Court has found the existence of several of the *Zimmer* factors (which might require the designing of single member districts with black voting age population of at least 60% if single member districts were required), none of the *Zimmer* factors found to exist in this case is of an exaggerated nature so as to require enhancement of the guidelines. Accordingly, even if the court were required to design single member districts, it would be proper to follow the guideline. Therefore, since Blacks constitute 60.5% of the voting age population, the entire town constitutes a district in which they can elect candidates of their choice.

The black citizens of the City of Woodville enjoy a substantial numerical advantage over the white citizens. If they were politically cohesive and so desired, they could easily exercise their electoral right to either elect a totally black city government or to change their form of government to a ward system. They do not need the assistance of a federal court.

Accordingly, the Court finds in favor of the Defendant and judgment will be entered.

APPENDIX C

§1973. Denial or abridgement or right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42USCS § 1973(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Aug. 6, 1965, P. L. 89-110, Title I, § 2, 79 Stat. 437; June 22, 1970, P. L. 91-285, § 2, 84 Stat. 314; Aug. 6, 1975, P. L. 94-73, Title II, § 206, 89 Stat. 402; June 29, 1982, P. L. 97-205, § 3, 96 Stat. 134.)

APPENDIX D

TRIAL PROCEEDINGS

BEFORE

THE HONORABLE
WILLIAM H. BARBOUR, JR.

UNITED STATES DISTRICT JUDGE

MAY 2, 3, 1988

VICKSBURG, MISSISSIPPI

EXCERPTS FROM
TESTIMONY OF
DR. RONALD LOVE

DIRECT EXAMINATION BY
WILLIE ROSE, ESQUIRE

is on the overlapping percentage but most of that relates to '83. In '87, to a lesser degree, blacks voted for black candidates than in '83.

Q. But you do have a professional opinion as to percentage of which blacks voted for black candidates in the 1987 election?

A. In most contests I would predict that they voted between 70 and 80 percent black but there were other contests that that was not true. I'll put it that way. I think that's probably the most accurate way of stating it.

Q. In what contest would that not have been true in?

A. If I can remember correctly, in '87 there was a Sheriff contest, I think.

Q. What about the Circuit Clerk contest?

A. I think yeah, and maybe a Circuit Clerks contest. But there was a number of instances where clearly there were some candidates in which blacks did not support, not to say that they didn't support them in the majority but there was a block of them that did not vote for them and voted for the white candidate, yes.

Q. Was that black cross over sufficient enough when it was mingled with the racial block voting to defeat the black candidate?

A. Of course. If you start out you're going to generally finish it.

racial block voting — that blacks are a political cohesive group in Woodville in Wilkinsobn County?

MR. HORN: Objection, leading.

MR. ROSE: Your Honor, only leading to lay a foundation. I think you can for purposes of laying grounds for an opinion.

THE COURT: Sustain the objection. Rephrase your question.

Q. Okay. Doctor, based upon your analysis of the 1983 and '87 elections in Woodville, was you able to reach a professional opinion based on probability as to political cohesiveness of the blacks living in that county?

A. I think, yes. Blacks are politically cohesive

though they sometimes vote — cross racial lines.

Q. In your opinion, how would you define political cohesion?

A. How people stick together, cohesive being the bond between them.

Q. What would be the determining factor in determining what percentage of a people has to vote a certain way for there to be — for you to determine political cohesion?

A. I guess it could be 51 percent or 60 percent.

Q. You would say it had to be a majority?

A. I woul say it had to be a majority, yes. Though I think that there are different standards for that, certainly,

V. 3, P. 239

candidates?

THE WITNESS: Yes.

THE COURT: Why do we pay you fellows to go through all these analysis if everybody knows that that's what happened?

THE WITNESS: To what degree that happens, differs based upon where you are. But in general, I think it's an established fact and statistics simply allow you to verify that much more cohesively. Sometimes I feel like you.

THE COURT: Be careful. You'll talk yourself out of a job.

THE WITNESS: I'd like to see the day when I don't have to do this.

Q. Doctor, have you a professional opinion as to the degree that whites vote for white candidates in the City of Woodville?

A. Yes. Almost absolutely. Almost 100 percent. I mean, that's — you never say that statistically. There's almost always a standard factor but I think very clearly whites vote for white candidates and that's been the case in every analysis I have done in the State of Mississippi and there's no exception in this one.

Q. Of course, when you were conducting this analysis you wasn't influenced by the other analysis that you have conducted.

APPENDIX E

TRIAL PROCEEDINGS

BEFORE

THE HONORABLE
WILLIAM H. BARBOUR, JR.

UNITED STATES DISTRICT JUDGE

MAY 6, 1988

VICKSBURG, MISSISSIPPI

EXCERPTS FROM
TESTIMONY OF
DR. CRAIG VAN GELDER

DIRECT EXAMINATION BY
CARROLL RHODES, ESQUIRE

V. 6, P 40

Q. Okay. I want to go back to the conclusion that you drew that blacks are not politically cohesive. Did you do an analysis of election returns for Wilkinson County for elections in 1983 and 1987?

A. I have not conducted an analysis of the election returns of the supervisor districts or county-wide elections for the City of Woodville for any years. I have crosschecked only some of the figures that Dr. Love indicated in his report in attempting to, in a sense, reconstruct what he was reporting. I have not conducted from the original data my own analysis of racial bloc voting patterns.

Q. So, when you say that blacks are not politically cohesive, you don't have your own independent conclusions derived from the —

A. The question — I'm sorry.

Q. — derived from your own independent research that blacks do not vote substantially as a bloc?

A. The question that I testified to was did I have an opinion as to a reasonable probability based upon the testimony that I heard in this court. And that was my answer. Based

V. 6, p 53

Q. If I could be a little more specific, what would be the percentage of blacks needed to vote for a black candidate in Woodville elections in order for you to say that blacks are politically cohesive in Woodville?

(Brief pause.)

A. Let me have a moment. I want to reflect a little bit on that in terms of my previous testimony.

Q. Yes, sir.

A. Is that all right?

Q. Yes, sir.

(Brief pause.)

A. Can you restate the question, please.

Q. Yeah. What in terms of Woodville's elections, what percentage of the black vote would have to vote consistently for a candidate of their choice, usually a black candidate, in order for you to determine that

blacks are politically cohesive?

A. It would be my opinion in terms of the testimony that I have given and my evaluation of the testimony that I have heard that if blacks would vote normally or usually in the range of 85 percent it would constitute political cohesiveness in being able to elect candidates of their choice.

V.6, P. 54

Q. Blacks would have — at least 85 percent of the black voters would have to vote?

A. 84 to 85 percent, mid-eighties to put it that way. 84 to 85 percent.

Q. Okay. Now, are you aware of the fact that there has been no election in the Town of Woodville since January 1, 1987?

A. In the Town of Woodville?

Q. Yes, sir. For municipal offices.

A. If I remember correctly it is 1985.

Q. Let me ask it another way. Since the anti-single shot provision that has been eliminated by the state of Mississippi have there been any elections conducted where voters in Woodville elections could single shot their vote?

A. Since January 1, 1987 there have not been municipal elections in the City of Woodville.

Q. So, you don't have any empirical data since January 1, '87 in which to assess whether or not the removal of an anti-single shot provision would remedy any violation of the section to the Voter Right's Act if the court were to find those?

A. There is no data available from an actual election to render a conclusion at this

Supreme Court, U.S.
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No. 89-1982

In The

Supreme Court of the United States

October Term, 1990

JOHN MONROE, ET AL.,

Petitioners,

v.

CITY OF WOODVILLE MISSISSIPPI, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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July 19, 1990

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QUESTION PRESENTED

Can the District Court's findings that Woodville's Black citizens are not politically cohesive be held clearly erroneous, particularly where there is a significant degree of cross-over voting for White candidates by the Black citizenry which constitutes a majority of the voting age population of the town.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the Appellants John Monroe, Dora Monroe, Jimmy Harris and Larry Johnson, individually in view of the fact the District Court concluded that the Plaintiffs failed to make out a class action under Rule 23 of the Federal Rules of Civil Procedure, and the Respondents City of Woodville, Mississippi, Ron Senko, Mayor of Woodville, Mississippi, George J. Gonda, former Mayor of Woodville, Mississippi, Andy J. Lewis, former Alderman; Frances Townsend, City Clerk, Gary D'Quilla, Charles James, Tim Sessions, Elnora Veals, current Aldermen; Joe Townsend, Mary Magee, and Herbert Curry, former Election Commissioners and Jessie Stewart, Dewey Bailey and Gail Sessions, current Election Commissioners.

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JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered Judgment on this appeal on August 30, 1989. Subsequently, Petitioners filed a Petition for Rehearing En Banc before the Fifth Circuit. On March 22, 1990, the Fifth Circuit considered Appellants' Petition as a Motion for Rehearing and granted it in part, and denied it in part, and denied the Petition for Rehearing En Banc.

STATUTES INVOLVED

This case involves Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973.

STATEMENT OF THE CASE

The City of Woodville, Mississippi, is one square mile in size and has a population of 1,512 residents. Of this population, 972 residents are Black (64.3%), and 540 are White (35.7%). With respect to voting age population of

age eighteen (18) or over, there are 632 Blacks (60.5%) and 412 Whites (39.5%). Two of the four aldermen are now Black.

The District Court made findings of fact, relied upon by the Fifth Circuit, as follows, namely: that there was no candidate slating process in Woodville; that overt or subtle racial appeals were absent in political campaigns within the city; that Woodville's small size resulted in a multi-member district which was not unusually large so as to hinder the opportunity of Blacks to elect representatives of their choice; that the anti-single shot provision had been repealed; that Black residents constituted a majority of Woodville's voting age population; that Blacks crossed over to vote for White candidates to a large degree; that Blacks served in many public offices in the surrounding Wilkinson County; that the Plaintiffs had failed to prove political cohesion among Black residents, and that, thereby the Plaintiffs failed to prove legally significant White block voting. The District Court also noted that Woodville's Black community is very active politically, setting forth for example, that in the May, 1985 Democratic Primary, eighty-six per cent of the registered voters voted.

The District Court also specifically found that there was no lack of responsiveness on the part of elected officials in Woodville, Mississippi, to the particularized needs of the Black community. Woodville has employed Blacks, including a Black in a managerial position as Superintendent of Utilities, Blacks as four of its five police officers, and a Black as one of its two Deputy City Clerks. Garbage collection, utilities and police services are provided equally. The District Court specifically

rejected the argument that roads were not equal upon a finding that the proof showed that the City had no control over the width of the streets in one Black area because only a very narrow street right-of-way had been provided when the houses were originally built. There was found to be no complaint that the roads throughout the town were maintained differently in Black and White areas, and all streets within the town in both the Black and White neighborhoods were paved. Thus it was the holding of the District Court, affirmed by the Fifth Circuit, that the Petitioners had not borne their burden of proof.

The expert witness for Petitioners, Dr. Ronald Love, formulated as a basic premise that the City of Woodville and the surrounding Wilkinson County shared similar demographic features and therefore the analysis of Wilkinson County voting tendencies applied to the City of Woodville itself. Black candidates have enjoyed considerable success in obtaining election to county offices in Wilkinson County. By this reasoning, the demographic evidence supports a finding that the Black majority population of Woodville is not materially hindered by the multi-member city elections so that it cannot participate effectively in the political process. Dr. Love specifically testified that Wilkinson County provides equal access to the political process for Blacks, based upon the success of Black candidates there.

The Fifth Circuit held that these findings by the District Court were not clearly erroneous. Rather, Plaintiffs/Petitioners' data from the 1987 elections weigh against a finding of political cohesiveness. There was

active disagreement between expert witnesses as to political cohesiveness and testimony from Black residents of Woodville also differed on this point. Specifically, two Black witnesses credited by the District Court testified that in their view, the Black residents of Woodville were not politically cohesive. By contrast, again, a number of Blacks have held public office in the surrounding Wilkinson County in recent years and two of the four aldermen are now Black. These facts, taken in view of a totality of circumstances, including the fact of the numerical majority of Black voters in the city of Woodville, Mississippi, establish that the findings of the District Court are not clearly erroneous and are properly upheld.

ARGUMENT

REASONS FOR DENYING THE WRIT

1. This Case Applies Settled Law.

42 U.S.C. Section 1973 provides that a violation of voting rights must be established as a matter of fact based on the totality of the circumstances, and that nothing in the law establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. Congress has instructed courts in adjudicating Section 2 claims to conduct a "searching and practical evaluation" of "past and present reality" to determine whether participation in the political process is "equally open" to all persons. *See, Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 2763-64 (1986) (quoting from S.Rep. no. 417). As guidance for this broad inquiry, Congress directed attention back to the Fifth Circuit's criteria

in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd, sub nom. East Carroll Parrish School Board v. Marshall*, 424 U.S. 636 (1976) (*per curiam*), which identified a number of factors generally relevant to a fact-bound, intensely local appraisal of the challenged electoral system. The Supreme Court, in *Thornburg v. Gingles*, acknowledged the totality of the circumstances approach and introduced an additional, threshold analysis to be used in challenges to at-large election systems. Under these criteria, all Circuits have uniformly cautioned their District Courts to undertake "fact specific assessments" of the relevance and probative value of election results, *e.g., West Wego Citizens for Better Government v. West Wego*, 872 F.2d 1201, 1208 n.8 (5th Cir. 1989) (specifically in regard to assessing exogenous election results).

These standards of law have been faithfully applied in the instant case.

2. There Is No Split Among The Circuits

Thornburg v. Gingles, supra, and the so-called "Zimmer" factors (*Zimmer v. McKeithen, supra,*) as set forth in the legislative history to Section 2 of the Voting Rights Act remain the law applicable to the Voting Rights Act in analysis of violations of Section 2. These standards have been applied by all circuits in making the locally fact specific findings necessary in such cases. Annotation: *"At-Large" Elections as Violation of Section 2 of Voting Rights Act of 1965* (42 U.S.C. Section 1973), 92 A.L.R. Fed. 824 (1989). There is no significant divergence requiring further definition from this Court.

CONCLUSION

This case was correctly decided under application of existing law under the clearly erroneous standard. There is no significant issue requiring review by this Court.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

JOHN MONROE, ET AL

PETITIONERS

V.

CITY OF WOODVILLE
MISSISSIPPI, ET AL

RESPONDENTS

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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THE QUESTIONS PRESENTED FOR REVIEW

1. Are minority voters politically cohesive when at least 70% of minority voters consistently vote as a bloc for the minority preferred candidate in contested political elections?

2. Is the test for determining legally significant white bloc voting as announced in *Thornburg v. Gingles*, 478 U. S. 30 (1986), the same in jurisdictions where white voters constitute a minority of the voting age population as in jurisdictions where white voters constitute a majority of the voting age population?

3. Does a factual finding that significant numbers of minority voters cross-over and vote for the candidate not preferred by the overwhelming majority of the minority voters preclude a finding of racial vote dilution?

LIST OF PARTIES

The parties to the proceeding below were the appellants JOHN MONROE, JIMMY HARRIS, DORA MONROE, LARRY JOHNSON and all others similarly situated and the appellees CITY OF WOODVILLE, MISSISSIPPI, RON SENKO, IN HIS CAPACITY OF MAYOR, AND CHARLES JAMES, GARY D'QUILLA, TIM SESSIONS, AS MEMBERS OF WOODVILLE, MISSISSIPPI BOARD OF ALDERMAN, JOE TOWNSEND, MARY MAGEE, AND HERBERT CURRY, AS MEMBERS OF THE CITY ELECTION COMMISSION AND FRANCES TOWNSEND AS CITY CLERK.

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REFERENCE TO OFFICIAL OPINIONS BY LOWER COURTS

Official decisions of lower courts are reported as follows: *Monroe v. City of Woodville,* 897 F. 2d 763 (5th Cir. 1990); *Monroe v. City of Woodville,* 881 F. 2d 1327 (5th Cir. 1989); *Monroe v. City of Woodville,* 688 F. 2d 255 (S.D. Miss. 1988); *Monroe v. City of Woodville,* 819 F. 2d 507 (5th Cir. 1987); *Monroe v. City of Woodville,* 636 F. Supp. 423 (S.D. Miss. 1986).

STATEMENT OF THE GROUNDS FOR INVOKING JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254 and 2101(c) and 42 U.S.C. Section 1973. The questions involved are of substantial importance. See *Thornburg v. Gingles,* 478 U. S. 30 (1986), compare *Frisdy v. Schultz,* 487 U.S. ____ (1988).

STATUTES INVOLVED

This case involves 42 U.S.C. Section 1973.

STATEMENT OF THE CASE

Petitioners rely upon the statement of the case as previously set out in the Petition for Writ of Certiorari.

ARGUMENT I

1. THIS CASE DEPARTS FROM SETTLED LAW.

Respondents assert that the instant case applies settled law. However, this assertion is not totally correct. The case appears, on its face, to apply settled law. But, it actually eviscerates this court's holding in *Thornburg v. Gingles,* 478 U.S. 30 (1986), the only case decided by this court interpreting Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended by Congress in 1982. In *Thornburg,* this court held:

> "[T]he 'right' question, as the Report emphasizes repeatedly, is whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political process and *to elect candidates of their choice."* (Emphasis added).

Thornburg v. Gingles, supra at 44.

The right question in the instant case is whether as a result of the at-large method of election of a multi-member body blacks in Woodville have an equal opportunity to participate in the political processes and *to elect candidates of their choice.* The right question does not concern the success of black candidates, after the filing of a vote dilution lawsuit, who are the choices of the white political establishment. *Thornburg v. Gingles, supra,* at 76. As stated in *Zimmer v. McKeithen,* 485 F. 2d 1297, 1307 (5th Cir. 1973) (en banc) and cited with approval in *Thornburg v. Gingles, supra,* at 77 n. 37:

> "[W]e cannot endorse the view that the success of black candidates at the polls necessarily foreclose the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different consideration — namely that election of a black candidate will thwart successful challenges to electoral schemes

on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district."

The fact that Woodville now has two black aldermen, the second black becoming an alderman by virtue of appointment by the white political establishment, does not defeat petitioners' vote dilution claim.[1]

2. THE CIRCUITS ARE SPLIT ON THE DEFINITION OF POLITICAL COHESIVENESS.

Respondents assert that all circuits have applied *Thornburg v. Gingles, supra,* and the "Zimmer" factors, *Zimmer v. McKeithen, supra,* when interpreting the command of the Voting Rights Act. With this broad assertion, petitioners do not disagree. But what respondents fail to comprehend is that the Fifth Circuit has altered the functional definition of political cohesion. The Fifth Circuit's definition of political cohesiveness is not consistent with this court's illumination of the concept as articulated in *Thornburg* nor is it consistent with other circuits.[2] Political cohesiveness is the most important factor in a vote dilution claim because it is defined by minority racial bloc voting. *Thornburg v. Gingles, supra,* 478 at 56; 48 n. 15.

[1]The fact that a second black alderman was elected, after first being appointed to serve the unexpired term of a white alderman who had resigned, was not before the district court. This fact was revealed at oral argument on petitioners' appeal to the Fifth Circuit Court of Appeals. This fact should not have been considered by the Fifth Circuit nor this Court without a fuller development of the record and without the district court first passing on the developed record.

[2]A three-judge district court in the 8th Cir. held that "there is racially polarized voting in races for the Arkansas State Legislature, that black voters usually vote cohesively, as a unit..." The court here clearly equates political cohesiveness with racially polarized voting. *Jeffers v. Clinton,* 731 F. Supp. 196, 209 (E.D. Ark. 1989) (three-judge court), Supreme Court appeal filed May 24, 1989, Docket No. 89-2008. See also; *Solomon v. Liberty County, Fla.*, 899 F. 2d 1012 (11th Cir. 1990); *Collins v. City of Norfolk, Va.*, 883 F. 2d 1232 (4th Cir. 1989); and *Gomez v. City of Watsonville,* 863 F. 2d 1407 (9th Cir. 1988).

CONCLUSION

On the basis of the foregoing facts and authorities, petitioners respectfully submit that their petition for a writ of certiorari should be granted.